Supreme Court, U.S.
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No. 07-

IN THE
Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises two interrelated questions that determine whether civil actions, class actions, and mass actions may be removed to federal court. On the first question, the Eleventh Circuit widened a longstanding circuit split. On the second question, the Eleventh Circuit's decision contradicts this Court's jurisprudence. The questions are:

1. When a plaintiff fails to seek a sum certain in a state court complaint, what burden must a removing defendant carry to prove the amount in controversy exceeds 28 U.S.C. § 1332's jurisdictional minimum: proof of an "unambiguous statement" by the plaintiff that "clearly establishes jurisdiction," as the Eleventh Circuit held below; proof by a "preponderance of the evidence," as the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits require; or proof by a "reasonable probability," as the Second Circuit requires?

2. If the evidence on the amount in controversy is uncertain, does a district court have discretion to permit discovery concerning the jurisdictional facts, as this Court has held, or is the district court barred from allowing jurisdictional discovery, as the Eleventh Circuit here held?

PARTIES TO THE PROCEEDINGS

Defendants-Appellants below who are Petitioners here are:

Alabama Power Company
Bailey-PVS Oxides, LLC
Butler Manufacturing Company
CertainTeed Corporation
Fritz Enterprises, Inc.
Hanna Steel Corporation
Honeywell International, Inc.
U.S. Steel Corporation
Vulcan Materials Company
W.J. Bullock, Inc.

The following were Defendants below but are not parties here:

Allied Signal, Inc.
Filler Products
ABC Acquisitions
Polymer Coil Coaters, Inc.

Allied Signal is a predecessor of Honeywell International, Inc. Polymer Coil Coaters, Inc. went through bankruptcy and was dismissed from the case. ABC Acquisitions was related to Polymer Coil Coaters, Inc.; ABC Acquisitions no longer exists.

The 9 original Plaintiffs-Appellees below who are Respondents here are:

Carolyn Brannon
Bernida Hill
Deginald Hill
Angelias Jones
Johnny Jones
Katie Lowery
Richard Lowery
Dennis Wingo
Michelle Wingo

A complete list of the remaining 408 respondents is included at App. 117a–129a.

The Southern Company is the parent of Petitioner Alabama Power Company.

Bailey Engineers, Inc. and PVS Chemicals, Inc. are the joint venture that owns Petitioner Bailey-PVS Oxides, LLC.

BIEC International, Inc. is the parent of Petitioner Butler Manufacturing; BlueScope Steel Limited, a publicly traded Australian company, is the parent of BIEC.

Saint-Gobain Delaware Corporation is the parent of Petitioner CertainTeed Corporation; Saint-Gobain Corporation is the parent of Saint-Gobain Delaware Corporation.

Hanna Holdings, Inc. is the parent of Petitioner Hanna Steel Corporation.

State Street Bank and Trust Company owns over 10 percent of Petitioner Honeywell International, Inc.'s stock.

State Farm Mutual Automobile Insurance Company owns over 10 percent of Petitioner Vulcan Materials Company's stock.

Allied Signal, Inc., Fritz Enterprises, U.S. Steel Corporation, and W.J. Bullock, Inc. do not have parents, and no publicly held company owns 10 percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

This case raises important questions concerning removal of diversity cases to federal court. The Eleventh Circuit's decision implicates a broad, mature circuit split over a removing defendant's burden of proving the amount in controversy when the complaint does not request a sum certain in damages. This circuit split is so well established that the two leading treatises on federal practice contain sections devoted to it. *See* 16 MOORE'S FEDERAL PRACTICE 3D § 107.14[2][g][v] (2007); 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3725, at 89–92 (1998 & 2007 Supp.). The Court should resolve the uncertainty because, as long as the split persists, access to federal court will depend on what standard applies in the district or circuit in which the courthouse happens to stand. Moreover, the split has even broader national impact now that the Class Action Fairness Act makes class actions and mass tort actions removable to federal court upon proof of a $5 million aggregate amount in controversy.

Certiorari should be granted.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a–88a) is published at 483 F.3d 1184. The Eleventh Circuit's order denying rehearing *en banc* (App. 115a–16a) is unpublished. The District Court's opinion (App. 89a–115a) is published at 460 F. Supp. 2d 1288.

JURISDICTION

The Eleventh Circuit entered its judgment on April 11, 2007. App. 1a. That court denied rehearing on January 3, 2008. App. 115a–16a. The case has not been remanded to state court, however. The Eleventh Circuit stayed issuance of its mandate pending review by this Court. This Court has jurisdiction over the Eleventh Circuit's judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Under 28 U.S.C. § 1332, two amount-in-controversy thresholds apply to diversity actions: $75,000 for all civil actions, and $5 million for class actions and mass actions under CAFA. 28 U.S.C. §§ 1332(a) & 1332(d)(2). CAFA requires aggregation of "the claims of the individual class members . . . to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6).

A defendant may remove cases filed in state court that could have been filed originally in federal court under § 1332. In an ordinary civil action, if the removing defendant is not a citizen of the forum state, a case within the court's diversity jurisdiction "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). A class action:

> may be removed to a district court of the United States . . . (except that the 1-year limitation under section 1446(b) shall not

> apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b). Under CAFA, mass actions are "deemed to be . . . removable" if they satisfy the jurisdictional requirements for class actions. 28 U.S.C. § 1332(d)(11)(A).

The procedure for removal is governed by 28 U.S.C. § 1446. Under § 1446(a),

> [a] defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Statement of the Case

1. This case is about determining the value of claims at the outset of litigation. Doing so is important because—assuming the citizenship requirements are satisfied—an amount in controversy that exceeds the jurisdictional minimum permits the defendant to remove a diversity case from state to federal court. But pinning down the amount in controversy is not always easy.

If the complaint does not plead a sum certain or pleads only the jurisdictional minimum of the state court, a removing defendant must itself establish the amount in controversy to get into federal court. And in practice, defendants must often carry this burden because many states have either followed Federal Rule of Civil Procedure 54(c), which does not limit damage awards to the amount specified in the complaint, or have enacted rules that prohibit plaintiffs from pleading a sum certain. *See generally* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 Mo. L. Rev. 681, 683–92 (1997).

The lower courts are split on *what* burden a removing defendant must carry when the complaint contains no definitive plea for damages. There is also uncertainty on *how* a removing defendant can carry that burden—that is, what evidence the defendant can use to establish the amount in controversy. The Eleventh Circuit's decision in this case puts it at the strictest end of the continuum on both issues.

First, the court held that without a sum certain pleaded in the complaint a defendant cannot remove a case to federal court unless it has "received from the plaintiff" "clear" and "unequivocal" evidence establishing the amount in controversy. App. 66a, 79a. If the defendant removes a case without such clear and unequivocal evidence, it will be subject to Rule 11 sanctions. App. 67a n.63. Second, the court held that a defendant cannot obtain post-removal discovery and that

district courts *never* have discretion to permit such discovery when the jurisdictional facts are unclear. App. 78a–79a, 87a.

These two holdings converge to make diversity removal practically impossible in Alabama, Florida, and Georgia. *See* Penelope A. Dixon and David J. Walz, *Removal After* Lowery v. Alabama Power Co.: *A Whole New Bag of Tricks*, 26 No. 4 TRIAL ADVOC. Q. 39 (2007). Under the Eleventh Circuit's decision, a plaintiff can block a defendant's statutory right of removal simply by omitting a sum certain from the complaint. And neither the defendant nor the district court can use discovery tools or other evidence to determine what amount is really in controversy. The impact of these holdings on diversity removal generally, and on CAFA removal specifically, explains why the case has drawn national attention. *See id.*; Georgene M. Vairo, *CAFA Mass Action Primer*, 30 No. 2 NAT'L L.J. 13, Col. 1 (Sept. 10, 2007); Thomas M. Byrne & Valerie S. Sanders, *"See No Removal, Hear No Removal": The 11th Circuit's New Posture on Removal in* Lowery v. Alabama Power Co., 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. 11 (Aug. 29, 2007).

2. This mass tort case was originally filed in Alabama state court. App. 3a. Nine plaintiffs sued twelve industrial and manufacturing plants asserting various torts. *Id.* & n.3. The plaintiffs claimed the defendants discharged pollutants that had settled onto the plaintiffs' bodies and property. Doc. 38, Attach. 2 ¶ 4. The original complaint contained a $1.25 million plea for each plaintiff on each count for lost property value, loss of use and enjoyment of property, personal injury, pain and

suffering, mental anguish, and punitive damages. *Id.* ¶ 5 & at 4–6; App. 3a–4a, 89a. Nonetheless, the case was not originally removable because a number of defendants were in-state defendants. *See* 28 U.S.C. § 1441(b). The original plaintiffs later added more than 400 additional plaintiffs asserting the same allegations. App. 4a, 90a.

In an amended complaint, the plaintiffs dropped their original $1.25 million per-plaintiff plea. App. 4a–5a. Instead, the plaintiffs sought an unspecified amount of compensatory and punitive damages. App. 90a.

After Congress passed CAFA, the plaintiffs amended their complaint again to add two new defendants, Alabama Power Company and Filler Products Company. App. 5a. Alabama Power, joined by the other defendants, removed the case to the Northern District of Alabama under CAFA's "mass action" provision, 28 U.S.C. § 1332(d)(11). App. 5a. That provision states that a mass action may be removed under 28 U.S.C. § 1453(b) if it involves "monetary relief claims of 100 or more persons . . . proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(A)–(B)(i). Alabama Power claimed that the case satisfied CAFA's new minimal diversity requirement and the $5 million aggregate amount in controversy. App. 5a.

The plaintiffs moved to remand. They argued that the amount in controversy was not satisfied because their amended complaint "references no specific amount of damages." App. 6a–7a & n.9.

In response to the remand motion, Alabama Power supplemented the evidence on the amount in controversy. App. 7a. It argued that the jurisdictional minimum was easily satisfied because the plaintiffs needed to recover only $12,500 each to exceed $5 million in the aggregate. *Id.* Alabama Power offered evidence of similar toxic tort suits in Alabama that had resulted in settlements or verdicts in excess of $5 million. *Id.* For instance, a jury verdict in a similar case awarded four property owners $1.9 million in compensatory damages and $17.5 million in punitive damages for property damage and emotional distress caused by carbon black particles emitted by the defendant's plant. Doc. 15, Ex. A. (The Eleventh Circuit recently affirmed the judgment on that verdict in full. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1323 (11th Cir. 2007).) Alabama Power also sought leave to conduct jurisdictional discovery. App. 8a.

3. Rather than rule on Alabama Power's motion for discovery, the district court ordered the plaintiffs to identify each plaintiff whose damages exceed $75,000. App. 9a–10a. The plaintiffs responded that they could not comply with the court's order, claiming that discovery was necessary before they could quantify their own damages. Doc. 33 at 2–3; Doc. 35; App. 11a.

The district court then withdrew its order and remanded the case. App. 12a–13a, 113a–14a. The court held that Alabama Power had failed to prove the jurisdictional minimum by a preponderance of the evidence. App. 103a, 108a–12a. The district court stayed its remand order pending review by the Eleventh Circuit. Docs. 46, 50, 53.

4. Although 28 U.S.C. § 1447(d) generally bars appeals of remand orders in civil cases, CAFA permits courts of appeals to grant discretionary review of remand orders in class or mass actions. 28 U.S.C. § 1453(c). The Eleventh Circuit granted the defendants' petitions for permission to appeal the district court's remand order. App. 15a. After argument, the court affirmed, holding that the defendants had failed to carry their burden of proving the amount in controversy. App. 86a–87a.

a. Concerning the burden of proof, the Eleventh Circuit acknowledged its test that, "where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence." App. 55a–56a. The court questioned whether the preponderance test was right and concluded that the test had originated from "dicta" in this Court's decision in *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). App. 58a–59a.

While the court glanced toward a preponderance test, the standard it applied (however labeled) resulted in a standard of proof much stricter. In particular, the court said, "If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand." App. 61a. Any such documents, the court said, must "unambiguously establish federal jurisdiction." App. 66a. Further, the court stated that when the complaint does not contain a sum certain, "the factual information establishing the jurisdictional amount must come from the plaintiff." App. 70a n.66. The Eleventh Circuit thus

requires a removing defendant to come forward with (1) an "unambiguous statement" (2) received directly from the plaintiff (3) that "clearly establishes" the amount in controversy. App. 79a.

The court candidly acknowledged that it was raising the removing defendant's burden of proof. The court admitted that "if a defendant can . . . carry the burden of establishing jurisdiction under these circumstances, then the defendant could have satisfied a far higher burden than preponderance of the evidence," like the "legal certainty" standard. App. 61a & n.59. The court also raised the stakes under Rule 11. It thought it would be "highly questionable" whether a defendant could file a notice of removal "in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11." App. 67a n.63.

b. Concerning post-removal discovery, the Eleventh Circuit acknowledged that remanding the case for jurisdictional discovery might permit the defendants to prove the amount in controversy. App. 72a & n.68. Nonetheless, the court held that discovery on the amount in controversy is *never* appropriate. App. 78a–79a. The court believed that allowing such discovery would be inconsistent with the parties' obligation under Rule 8 to set forth the factual basis for jurisdiction, as well as their obligation under Rule 11 to make such allegations in good faith. App. 73a, 76a–78a. The court went further to hold that district courts have no discretion to conduct such discovery on their own initiative. App. 79a & n.76, 87a.

5. The defendants filed a timely petition for rehearing. Although an Eleventh Circuit judge called for a poll on rehearing *en banc*, a majority did not vote for rehearing. App. 115a–16a. Although it denied rehearing, the Eleventh Circuit has stayed issuance of its mandate pending certiorari review by this Court.

Reasons for Granting the Petition

I. The longstanding conflict over a removing defendant's burden of proving the amount in controversy warrants this Court's review.

A. The lower courts have adopted several different standards to govern a removing defendant's burden of proving the amount in controversy.

There is a longstanding split of authority among the lower courts[1] on what burden a removing defendant must carry to prove the amount in controversy when the complaint does not seek a sum certain. *See* 16 Moore's Federal Practice 3d § 107.14[2][g][v] (2007); 14C Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3725, at 89–92 (1998 & 2007 Supp.). This split is widely acknowledged, both inside and outside the Eleventh Circuit. *See, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356–57 & n.7 (11th

[1] Splits of authority on removal issues often reach down to the district courts because the appeal bar of 28 U.S.C. § 1447(d) keeps the issues largely out of the circuit courts. *See Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999) (noting certiorari was granted on removal issue due to a split of authority among the "lower courts").

Cir. 1996), *overruled on other grounds by Cohen v. Office Depot*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 & n.2 (10th Cir. 2001); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402–04 (9th Cir. 1996); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993).

1. The Eleventh Circuit applies a "clear and unambiguous statement" test.

When the complaint does not seek a sum certain, the Eleventh Circuit requires a removing defendant to produce an "unambiguous statement" that "clearly establishes" the jurisdictional minimum. App. 79a.[2] In deciding the issue, the district court is to consider only "the document received by the defendant from the plaintiff—be it the complaint or a later received paper." App. 66a.[3] If the documents received from the plaintiff

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[2] The rule applied by the Eleventh Circuit here is close, if not identical, to the "legal certainty test." Several district courts require a removing defendant to prove the amount in controversy to a "legal certainty" when the complaint does not seek a sum certain *See, e.g., Universal Ins. Co. v. Warrantech Corp.*, 392 F. Supp. 2d 205, 209 (D.P.R. 2005); *White v. J.C. Penney Life Ins. Co.*, 861 F. Supp. 25, 27 (S.D. W. Va. 1994). These district courts are within the First and Fourth Circuits, which have not adopted a governing standard on the issue.

[3] Although the Tenth Circuit has not taken sides on which burden of proof a removing defendant must carry, it is in accord with the Eleventh Circuit on what documents are jurisdictionally relevant. It has held that "the requisite amount in controversy (Cont'd)

do not establish the amount in controversy, "neither the defendants not the court may speculate in an attempt to make up for the notice's failings." App. 70a–71a.

The Eleventh Circuit rightly acknowledged that a removing defendant who can satisfy this clear-statement standard could prove the amount in controversy to a "legal certainty." App. 61a & n.59. The court all but jettisoned the preponderance standard by strictly limiting the relevant documents to only those "received by the defendant from the plaintiff." App. 66a. Thus, in situations "where damages are unspecified and only the bare pleadings are available," the court admitted that "we are at a loss as to how to apply the preponderance burden meaningfully." App. 60a. With no evidence to weigh, and absent the plaintiff volunteering a statement in excess of the jurisdictional threshold, the court concluded that "any attempt to engage in a preponderance of the evidence assessment . . . would amount to unabashed guesswork." App. 60a.

2. *The Third, Fifth, Sixth, Seventh, and Ninth Circuits apply a "preponderance of the evidence" test.*

A majority of the circuits requires a removing defendant, absent a plea for a sum certain, to prove the jurisdictional minimum by a "preponderance of the evidence." The Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits apply the preponderance standard.

(Cont'd)

and the existence of diversity must be *affirmatively established* on the face of either the [complaint] or the removal notice," without consideration of other evidence. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis added), *followed in Martin*, 251 F.3d at 1290.

See Frederico v. Home Depot, 507 F.3d 188, 195–96 & n.6 (3d Cir. 2007) (preponderance test applies if facts contested; legal certainty test, if not); *Gafford*, 997 F.2d at 158, *followed in Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993); *Andrews v. E.I. DuPont de Nemours & Co.*, 447 F.3d 510, 515 (7th Cir. 2006); *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003); *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2006).

In applying the preponderance test, these courts look first to the removal papers to discern whether the jurisdictional minimum is satisfied. If the amount in controversy is still uncertain, they allow summary-judgment type evidence on the question. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995), *followed in Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997); *Harmon v. OKI Sys.*, 115 F.3d 477, 479–80 (7th Cir. 1997). This includes not only affidavits from the defendant, but also evidence of damages sought in prior complaints, damage awards in similar cases, the plaintiff's judicial admissions concerning damages, refusals to stipulate to damages, discovery responses, and the like. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541–42 (7th Cir. 2006); *Kroske*, 432 F.3d at 980; *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 573 (6th Cir. 2001) (citing *Rogers v. Wal-Mart*, 230 F.3d 868, 871 (6th Cir. 2000)); *De Aguilar*, 11 F.3d at 58.

In sharp conflict with the Eleventh Circuit here, these courts hold that when the issue is ambiguous both the defendant and the court can independently appraise

the amount in controversy. *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. 1993); *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 n.6 (5th Cir. 1992). Once the defendant has proved that the plaintiff is seeking the jurisdictional minimum by a preponderance of the evidence, the plaintiff can defeat federal jurisdiction only by disproving to a legal certainty that the minimum amount is actually in controversy. *Frederico*, 507 F.3d at 196; *Meridian Sec. Ins.*, 441 F.3d at 541; *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002).

3. The Second Circuit applies a "reasonable probability" test.

The Second Circuit applies a "reasonable probability" test. That test is a lighter burden to carry when the damages are unspecified.[4] It requires a removing defendant to prove some "reasonable probability" that the jurisdictional minimum is at stake. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 298 (2d Cir. 2000); *Ball v. Hershey Foods Corp.*, 842 F. Supp. 44, 47 (D. Conn. 1993) ("If there is a reasonable possibility that the plaintiff can recover more than $50,000 on his claim, the jurisdictional minimum is satisfied.") (internal alteration and citation omitted), *aff'd*, 14 F.3d 591 (2d Cir. 1993) (Table); *see also*

[4] The lightest burden of proof is the "inverted legal certainty" test applied by some district courts. When the complaint fails to plead a sum certain, that test requires a removing defendant to show that it does *not* appear to a legal certainty that the plaintiff's claim is for *less* than the jurisdictional amount. *See, e.g., Woodward v. Newcourt Comm'l Fin. Corp.*, 60 F. Supp. 2d 530, 531 (D.S.C. 1999).

Vermande v. Hyundai Motor Am., Inc., 352 F. Supp. 2d 195, 203 (D. Conn. 2004); *Maxons Restorations, Inc. v. Newman*, 292 F. Supp. 2d 477, 481–82 (S.D.N.Y. 2003); *Paradise Distributors, Inc. v. Evansville Brewing Co.*, 906 F. Supp. 619, 621 (N.D. Okla. 1995).

B. The burden of proof is outcome determinative in this case.

The impact of these varying standards is not theoretical. As a practical matter, "the standard of proof is determinative of jurisdiction." Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. __ (forthcoming June 2008), Draft at 23 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966). *See also* Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 110 (2007) (observing that unanswered questions, including the amount-in-controversy burden "the defendant has to meet (for example, preponderance, legal certainty, or reasonable probability)" could "have an effect on the outcome, especially in close cases").

So too, here, the jurisdictional outcome depends entirely on the Eleventh Circuit's strict rule. The result would have been different if the case had arisen in another circuit. The Eleventh Circuit held that the defendants failed to produce an "unambiguous statement on the face of the amended complaint . . . sufficient to establish that plaintiffs' claims potentially exceed $5,000,000 in aggregate." App. 81a. The court reached that conclusion after considering—and rejecting—the

defendants' reliance on three types of evidence: (1) the request for $1.25 million per plaintiff in the original complaint, (2) a calculation of the damages each plaintiff would need to recover to exceed the jurisdictional threshold, and (3) damage awards in similar cases in Alabama. One or more of these types of proof would have been sufficient to establish jurisdiction in other circuits whose tests look beyond the four-corners of the complaint or other statements "received by the defendant from the plaintiff." App. 66a.

First, the Eleventh Circuit disregarded the $1.25 million per-plaintiff plea in the original complaint. App. 81a–82a. The court instead credited the statement in the amended complaint that the plaintiffs' claims involved in excess of $3,000 (the jurisdictional minimum for circuit courts in Alabama), even after more than 400 plaintiffs had joined the case. App. 84a. Had the case arisen in other circuits, the outcome would have been different. In *De Aguilar v. Boeing*, for instance, the Fifth Circuit considered the plaintiffs' $5 million plea in a prior complaint arising from the same plane crash as evidence that their claims in fact exceeded the jurisdictional threshold for federal court. 11 F.3d at 58. The Fifth Circuit rejected plaintiffs' counsel's after-the-fact affidavits claiming less than $50,000 per plaintiff was in controversy. *Id.* at 57. The court found "[t]he inconsistency between the plaintiffs' prior claims and their current claims . . . may indicate that the plaintiffs, rather than trying to clarify the actual amount in controversy, engaged in artful post-removal pleading." *Id.* at 58.

Second, the Eleventh Circuit refused to accept the defendants' per-plaintiff calculation that only $12,500 in damages for each plaintiff would put more than $5 million in controversy. App. 84a–85a. Acknowledging that was a "relatively low hurdle"—especially given the plaintiffs' claims for continuing nuisances and punitive damages—the court nonetheless refused to engage in "impermissible speculation." App. 85a. The result would have been different in other courts. For example, the Third Circuit in *Frederico v. Home Depot* found that the removing defendant had carried its burden by calculating that 2,233 class members needed to recover only $287.14 apiece, plus quintuple punitive damages under New Jersey law, to exceed the $5 million CAFA threshold. 507 F.3d at 197–99. The Seventh Circuit has also relied on similar per-plaintiff calculations to find that a removing defendant carried its burden of proving the $5 million amount in controversy under CAFA. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005) ("Countrywide concedes that it sent at least 3,800 advertising faxes, and [the Telephone Consumer Protection Act] provides that the court may award $500 per fax, a sum that may be trebled . . . . The award thus could reach $5.7 million."), *followed in Meridian Sec. Ins.*, 441 F.3d at 537.

Third, the Eleventh Circuit discounted the defendants' use of similar damage awards to prove the amount in controversy raised by the plaintiffs' claims. App. 85a–86a. According to the court, "the facts regarding other cases tell us nothing about the value of the claims in this lawsuit." App. 86a. The Eleventh Circuit's refusal to consider judgments and settlements in similar cases stands in stark contrast to the practice

followed elsewhere. As one Alabama district court recently explained, "Prior to [*Lowery*], Alabama personal injury cases and wrongful death cases with no *ad damnum* . . . were regularly removed" via a notice of removal that proved the amount in controversy "by citing jury awards in excess of $75,000 in similar Alabama tort cases." *Constant v. Int'l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308, 1309 (N.D. Ala. 2007). That practice still prevails, for instance, in the Fifth and Ninth Circuits. *See De Aguilar*, 11 F.3d at 58; *Kroske*, 432 F.3d at 980. Had this case arisen there, the defendants' reliance on cases like *Action Marine*, 481 F.3d 1302 (11th Cir. 2007) (affirming $19 million verdict to four property owners in similar environmental particulates case), would have been sufficient to secure removal.

In sum, the outcome of the jurisdictional question presented would differ depending on which burden of proof applies and what evidence a removing defendant can use to carry that burden. This case thus presents an ideal vehicle for the Court to resolve this longstanding split of authority.

C. The split of authority over a removing defendant's burden of proof has arisen due to confusion over this Court's precedent.

Certiorari is particularly appropriate here because the existing uncertainty over a removing defendant's burden of proof can be traced to confusion over how to read two of this Court's decisions from the 1930s: *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). *See Guglielmo v.*

McKee Foods Corp., 506 F.3d 696, 702–05 (9th Cir. 2007) (O'Scannlain, J., concurring specially) (trying to harmonize *St. Paul Mercury* and *McNutt* and urging the adoption of a "single, consistent burden of proof"); *Meridian Sec. Ins.*, 441 F.3d at 539–41 (Easterbrook, J.) (tracing confusion over the Seventh Circuit's standard to *St. Paul Mercury* and *McNutt*); *Frederico*, 507 F.3d at 193–97 (Aldisert, J.) (reconciling *St. Paul Mercury* and *McNutt* based on whether the jurisdictional dispute concerns factual matters); *see generally* Noble-Allgire, *supra*, 62 Mo. L. Rev. at 692–99.

The Eleventh Circuit and other courts trace the "legal certainty" test to the Court's 1938 decision in *St. Paul Mercury*. *See* App. 61a n.59; *Universal Ins.*, 392 F. Supp. 2d at 208; *Atkins v. Harcros Chems., Inc.*, 761 F. Supp. 444, 445 n.3 (E.D. La. 1991). The state court complaint in *St. Paul Mercury* pleaded $1,000 more than the amount in controversy, but post-removal evidence offered by the plaintiff revealed damages below the threshold. 303 U.S. at 285. It was in this context that the Court said "the sum claimed by the plaintiff controls" and "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount" to "oust the jurisdiction." *Id.* at 288–89. Because the complaint had pleaded damages above the jurisdictional minimum at the time of removal, the Court held removal was proper. *Id.* at 295–96. *St. Paul Mercury* has provided uncertain guidance, however, to courts faced with the tougher issue of determining the amount in controversy when damages are unspecified. *See Gafford*, 997 F.2d at 157–58. Also, *St. Paul Mercury s* precise holding says more about defeating federal jurisdiction after it has attached than about establishing removal jurisdiction in the first instance. *See Sanchez*, 102 F.3d at 401–03 (following *Garza v. Bettcher Indus., Inc.*, 752 F. Supp.

753, 755–56 (E.D. Mich. 1990)); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995) (same); *Gafford*, 997 F.2d at 160.

Courts that apply the "preponderance of the evidence" test rely on the Court's earlier 1936 statement in *McNutt* that the "party alleging jurisdiction" may be required to "justify his allegations by a preponderance of evidence." 298 U.S. at 189. *See Meridian Sec. Ins.*, 441 F.3d at 542; *Sanchez*, 102 F.3d at 403–04; *Gafford*, 997 F.2d at 160; *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992), *followed in De Aguilar*, 11 F.3d at 58. But *McNutt* was not a removal case. Moreover, the jurisdictional question in *McNutt* was not raised until after the case was on appeal. 298 U.S. at 179–80. Consequently, the plaintiff had offered no evidence on the amount in controversy to support federal jurisdiction, and the district court had made no findings of fact. *Id.* at 190. These procedural details led the Eleventh Circuit here to conclude that *McNutt*'s preponderance standard is "dicta," making application of that standard in the removal context "problematic." App. 58a–59a & n.58.

Courts within the Second Circuit that apply the "reasonable probability" test have reached no consensus on whether *St. Paul Mercury* or *McNutt* or some other standard should govern. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 207 F. Supp. 2d 71, 75–77 (W.D.N.Y. 2002) (on remand from the Second Circuit, 216 F.3d 291, for application of its "reasonable probability" test, contrasting *St. Paul Mercury* and *McNutt*, tracing the

confusion over which test to apply, and concluding that the "legal certainty" standard should be kept in mind while applying the Second Circuit's test).

Without precedent from the Court on these issues in seven decades, the lower courts have exhausted the various possible burdens that can apply and what evidence a removing defendant can use to carry those burdens. Neither *St. Paul Mercury* nor *McNutt* provides sufficient guidance to resolve the confusion. Uncertainty on these issues can only get worse, as the Eleventh Circuit's decision here shows. Prompt intervention by this Court is therefore necessary to establish uniform standards governing removal jurisdiction and practice.

II. The Eleventh Circuit's prohibition on jurisdictional discovery is inconsistent with this Court's precedent.

A removing defendant's burden of proving the amount in controversy when damages are unspecified is intertwined with its ability to conduct post-removal discovery on the amount in controversy. Discovery is one of the tools removing defendants and courts have historically used to determine the amount in controversy where none has been pleaded. But the Eleventh Circuit has stopped that practice. The court held, without citing any authority, that jurisdictional discovery into the amount in controversy is improper in diversity removals. App. 72a–79a & n.71. The court went further to hold that a district court has no discretion either to permit the parties to conduct such discovery or to engage in it on its own. App. 79a & n.76, 87a. To hold otherwise, the

Eleventh Circuit said, would "impermissibly lighten[]" a removing defendant's "burden of establishing jurisdiction." App. 78a–79a.

A. The Eleventh Circuit's discovery holding conflicts with this Court's precedent.

The Eleventh Circuit's holding is contrary to this Court's precedent. This Court has long given district courts the discretion to employ a wide variety of tools—including discovery—to determine subject matter jurisdiction. In 1939, discussing what was then the federal-question amount in controversy, the Court held that because "there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939). *See also McNutt*, 298 U.S. at 184 ("The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist.") (internal quotation and citations omitted). Among the steps *Gibbs* said the district court could take was "call[ing] for [the] justification" of jurisdictional allegations "by evidence." 307 U.S. at 72. *Accord Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own."). *See generally* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1350, at 250–51 & nn.74–75 (2004) (stating that district court may collect evidence and allow discovery before ruling on a challenge to subject matter jurisdiction) (collecting cases).

Since *Gibbs*, this Court has repeatedly given district courts the discretion to use traditional discovery tools to assess jurisdiction. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79 (1988) ("Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."). Significantly, the Court in *Martin v. Franklin Capital Corp.* noted that a plaintiff's "failure to disclose facts necessary to determine jurisdiction" following removal could justify the denial of fee-shifting under 28 U.S.C. § 1447(c)). 546 U.S. 132, 141 (2005). There is no way to square the Eleventh Circuit's outright refusal to sanction jurisdictional discovery with this Court's precedent.

B. The Eleventh Circuit's discovery holding departs from accepted practice in the lower courts.

Given this Court's precedent, it should come as no surprise that the Eleventh Circuit's discovery holding is out of step with established practice in the lower courts allowing jurisdictional discovery. *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2009, at 124 & n.2 (1994) ("Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper."); 16 MOORE'S FEDERAL

PRACTICE 3D § 107.14[2][g][i][A] (2007) ("A defendant seeking removal can usually determine an appropriate range of damages through discovery.").

Where jurisdictional facts are not clear from the complaint, courts ordinarily permit a removing defendant to conduct limited jurisdictional discovery. *See, e.g., Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568, 574 (5th Cir. 2004); *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 985 (S.D. Cal. 2005). This includes post-removal discovery to determine whether the jurisdictional minimum is satisfied. *See, e.g., LaSusa v. Lake Mich. Trans-Lake Shortcut, Inc.*, 113 F. Supp. 2d 1306, 1310 (E.D. Wis. 2000) ("If the plaintiffs are truly playing 'hide the ball' with respect to damages, *i.e.*, sitting on evidence of significant damages in order to defeat federal jurisdiction," then "limited discovery concerning damages will reveal them at their game."); *Harmon v. OKI Sys.*, 902 F. Supp. 176, 178 (S.D. Ind. 1995), *aff'd*, 115 F.3d 477, 479–80 (7th Cir. 1997); *McCraw v. Lyons*, 863 F. Supp. 430, 435 (W.D. Ky. 1994). Contrary to the Eleventh Circuit, the Ninth Circuit has stated that district courts have discretion to allow post-removal discovery specifically on CAFA's amount in controversy. *See Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 691 (9th Cir. 2006). The Eleventh Circuit's flat prohibition on jurisdictional discovery thus marks a sharp departure from established practice.

Certiorari is warranted on both questions presented because they go hand in hand. Both address the process by which district courts evaluate their jurisdiction. When this Court determines the proper burden of proof, it would make sense for the Court to also explain how, as a

practical matter, that proof may be obtained. Moreover, from a practitioner's perspective, whether post-removal discovery can be used is just as important as the burden of proof that applies. The Court should therefore grant certiorari on both questions.

III. The issues raised are important to the fair and uniform administration of removal jurisdiction.

This Court's resolution of the questions presented is important to the fair and uniform administration of removal jurisdiction. Under the current state of affairs, a defendant's right to a federal forum via removal turns on what standard applies in any given district or circuit. If the standard is too high, as it is now in the Eleventh Circuit, removal will almost always end in remand. *See* Byrne & Sanders, *supra*, 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. at 12 ("Can [*Lowery's*] standard be met, at least in tort cases, absent a concession from the plaintiff that the requisite amount is at stake?"). A threshold issue as important as the choice between state or federal court should not be subject to varying standards in different courts across the country. This Court should step in now to resolve this mature disagreement and establish a uniform standard for all federal courts.

CAFA's enactment has only heightened the importance of the questions presented. CAFA amended 28 U.S.C. § 1332 and added § 1453 to give federal courts jurisdiction over nationwide class actions and make them removable to federal court. An express purpose of those changes was to prevent plaintiff's lawyers from manipulating the amount in controversy to avoid federal jurisdiction over such actions. S. Rep. 109-14, at 10–11

(2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11–12 ("[C]lass action lawyers typically misuse the jurisdictional threshold to keep their cases out of federal court."). The existing split of authority on a removing defendant's burden of proving the amount in controversy has undermined this congressional purpose. *See* Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 15–23 (noting that the CAFA cases addressing the burden of proving the amount in controversy have "split badly" and arguing that setting a standard as high as that in *Lowery* means the defendant will "often fail in its removal effort"). There is also the risk that courts are tightening removal standards to counteract CAFA's expansion of federal jurisdiction. *See* Vairo, *supra*, 30 No. 2 NAT'L L.J. 13, Col. 1 ("Given CAFA's legislative history, one might wonder why the [*Lowery*] court would craft such high jurisdictional hurdles for the removing defendant to navigate. The key may well be found in self-preservation."); Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 24–36 (tracking judicial resistance to CAFA).

The sheer number of cases affected by these issues is also significant. Out of roughly 250,000 total case filings in federal court annually, approximately 30,000 reach federal court through removal. Administrative Office of the Federal Courts, *Annual Report of the Director: Judicial Business of the United States Courts*, Statistical Table S-7 (2007) (30,282 removals out of 257,507 total filings for 2007; 29,437 removals out of 259,541, for 2006; 30,178 removals out of 253,273, for 2005). Looking specifically at CAFA cases, the percentage is much higher. A recent study of decisions in CAFA cases published between 2005 and 2007 showed

that 91 percent of the cases were originally filed in state court and removed to federal court. Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 8.

If allowed to stand, the decision below will give plaintiffs exclusive control over a defendant's statutory right of removal. Normally, the plaintiff's right to choose his or her forum is counterbalanced by the defendant's right to remove cases within federal jurisdiction to federal court. But by preventing diversity removals except when the defendant has received a statement from the plaintiff that clearly and unambiguously establishes federal jurisdiction, the Eleventh Circuit has impermissibly tipped the scales in favor of plaintiffs. Without a clear statement unequivocally establishing the amount in controversy, and no longer able to conduct post-removal discovery, defendants will be stuck in state court. Provided the plaintiff does not volunteer the amount of damages at issue and can stave off discovery for a year, ordinary civil actions will become removal-proof after one year. 28 U.S.C. § 1446(b). Class actions and mass actions will be subject to similar gamesmanship, contrary to CAFA's purpose.

The Eleventh Circuit's prohibition of jurisdictional discovery only exacerbates the problem. With the exception of the decision below, district courts have been given broad discretion to determine jurisdictional matters in the way they see fit. Protecting a circuit court's ability to review jurisdictional decisions *de novo* (*see* App. 79a n.76) does not justify stripping district courts of such well-established discretion. Moreover, forcing removing defendants to risk Rule 11 sanctions when the plaintiff has not volunteered evidence of the

amount in controversy (*see* App. 73a–79a) puts too high a price on the right to remove. According to the Eleventh Circuit, any request for post-removal discovery into the amount in controversy "is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists." App. 78a. But Rule 11 only requires that "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support *after a reasonable opportunity for further investigation or discovery*." Fed. R. Civ. P. 11(b)(3) (emphasis added). Only by taking away the ability to conduct discovery on jurisdictional facts could the court suggest that the party who requests such discovery be subject to Rule 11 sanctions.

In sum, the Court would be hard-pressed to find a case of greater practical and widespread importance to the practicing bar. One of the most important questions any civil litigator faces is whether a case should be in state or federal court. The decision below dramatically altered the rules of the game and has caused upheaval in the Eleventh Circuit and beyond. The discord *Lowery* has created in the law of federal jurisdiction, and the practical effect it is having on civil litigation, warrant granting certiorari on both questions presented.

Conclusion

For these reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 11, 2007

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 06-16324, 06-16325

D.C. Docket No. 06-01370-CV-2-WMA

KATIE LOWERY, RICHARD LOWERY, JOHNNY JONES, ANGELA JONES, DENNIS WINGO, and other plaintiffs as listed on complaint,

Plaintiffs-Appellees,

versus

ALABAMA POWER COMPANY, HONEYWELL INTERNATIONAL, INC., HANNA STEEL CORPORATION, CERTAINTEED CORP., et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

(April 11, 2007)

Appendix A

Before TJOFLAT, BARKETT and MARCUS, Circuit Judges.

TJOFLAT, Circuit Judge:

In these consolidated appeals, we are confronted with the task of interpreting several provisions of the Class Action Fairness Act of 2005 ("CAFA" or the "Act"), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). The plaintiffs-appellees (the "plaintiffs") sued the defendants-appellants (the "defendants") in an Alabama circuit court, alleging various tort claims under state law. The defendants removed the case to federal district court, citing CAFA as a basis for removal. The district court, upon motion to remand, found that the defendants did not carry their burden of establishing that the court had jurisdiction under the Act and remanded the case to the Alabama court. CAFA authorizes appeals of remand orders in cases that fall within the Act's ambit; the defendants petitioned this court for leave to take such an appeal, and we granted their petition.

To decide this case, we must unravel some of the mysteries of CAFA's cryptic text. We must also consider existing principles of law governing removal generally—who bears the burden of establishing that removal is proper, how that party can satisfy its burden, and how a district court must proceed in evaluating its jurisdiction after removal.

Appendix A

I.

On January 24, 2003, Katie Lowery and eight other residents of Jefferson County, Alabama[1] filed suit in the Jefferson County Circuit Court against twelve corporations[2] and 120 fictitious entities for discharging particulates and gases into the atmosphere and ground water. Their complaint, framed in six counts,[3] alleged

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1. Katie Lowery, Richard Lowery, Johnny Jones, Angela Jones, Dennis Wingo, Michelle Wingo, Carolyn Brannon, Deginald Hill and Anita Hill were the original named plaintiffs.

2. The twelve defendants were Honeywell International, Inc.; Hanna Steel Corporation ("Hanna Steel"); CertainTeed Corporation; Butler Manufacturing Co.; Bailey PVS OVS Oxides, LLC; Allied Signal, Inc.; ABC Acquisitions; Polymer Coil Coaters; United States Steel Corporation; W.J. Bullock, Inc.; Fritz Enterprises, Inc.; and Vulcan Materials, Inc.

3. The complaint's six counts were based on Alabama tort law. Count One alleged trespass to the plaintiffs' person and realty. In Count Two, the plaintiffs alleged that the defendants "negligently, wantonly or intentionally caused them injury" by discharging pollutants; or by manufacturing, distributing, maintaining, designing, or servicing equipment used by the defendants; or "by failing to warn that equipment that they manufactured, maintained, designed or serviced was likely to cause or allow or fail to detect discharges into the atmosphere." Count Three set forth a nuisance claim; plaintiffs alleged that the defendants "have created and are creating a nuisance that has caused injury to the plaintiffs." In Count Four, the plaintiffs claimed that the defendants discharged pollutants "with knowledge that they are diminishing the ability of the Plaintiffs

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that this pollution caused them to suffer personal injuries, physical pain and mental anguish, and the loss of the use and enjoyment of their property; each plaintiff demanded compensatory and punitive damages of $1,250,000. Between January 24, 2003, and June 20, 2006, the plaintiffs amended their complaint three times, adding more than four hundred plaintiffs[4] and amending their prayers for relief.[5] The amended prayers for relief

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to use and enjoy their property and with further knowledge that they may be causing the Plaintiffs to suffer physical injury and with further knowledge that they were likely to cause the Plaintiffs extreme emotional distress." Plaintiffs alleged, in Count Five, that the fictitious defendants manufactured products that were not reasonably safe, breached implied warranties of safety and fitness, were liable under the Alabama Extended Manufacturers Liability Doctrine, failed to adequately warn, or otherwise breached duties to the plaintiffs. In Count Six, the plaintiffs charged fictitious defendants with negligently, wantonly or intentionally breaching their duty to perform various services for the named defendants related to the operation of premises near the plaintiffs' property.

4. These plaintiffs were added as parties because their claims, like those of the original plaintiffs, shared common questions of law and fact. *See* Ala. R. Civ. P. 20. Although the plaintiffs could have brought the suit as a class action, they did not do so. *See* Ala. R. Civ. P. 23.

5. In their answers to the plaintiffs' initial and subsequent complaints, the defendants denied liability. Some of the answers contained affirmative defenses, none of which are pertinent to this appeal.

no longer claimed $1,250,000 on each claim, but instead, sought "compensatory and punitive damages in an amount . . . in excess of the [court's] minimum jurisdictional limit."[6] The third and final amended complaint, filed on June 20, 2006, added two defendants: Alabama Power Company ("Alabama Power") and Filler Products Company, Inc. ("Filler Products").

On July 17, 2006, Alabama Power filed a notice of removal under the "mass action" provision of CAFA, 28 U.S.C. § 1332(d)(11), in the United States District Court for the Northern District of Alabama. In its notice of removal, Alabama Power asserted that the district court had jurisdiction over the case because the requisite diversity of citizenship existed, the complaint consisted of the claims of more than 100 persons, each claim was for an amount in excess of $75,000, the claims totaled in excess of $5,000,000, and the claims involved common questions of law or fact.[7] Alabama Power attached to its

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6. Circuit courts in Alabama have jurisdiction over civil matters in which the amount in controversy exceeds $3,000, exclusive of interests and costs. Ala. Code § 12-11-30(1).

7. As we explain in detail in part III, *infra*, CAFA gives the district courts subject matter jurisdiction to entertain a "mass action" removed from state court provided that the action has been brought by 100 or more plaintiffs whose combined claims total in excess of $5,000,000. In its notice of removal, Alabama Power, believing that the claims of each plaintiff had to exceed $75,000 in order for the district court to have jurisdiction, asserted that the total of each plaintiff's claims exceeded that amount. Alabama Power subsequently abandoned this assertion,

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notice of removal copies of the original complaint and the third amended complaint.[8]

The plaintiffs responded to Alabama Power's notice of removal on August 3, 2006 by filing a motion to remand the case to the Jefferson County Circuit Court. Their motion asserted that Alabama Power had not met its burden of establishing federal jurisdiction because nothing in the notice of removal or the complaint

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contending instead that the $75,000 figure is a limitation on the district court's exercise of its jurisdiction over a mass action's discrete plaintiffs rather than a jurisdictional prerequisite for the mass action itself. In other words, Alabama Power asserted that CAFA bars the court from asserting jurisdiction over any plaintiff whose claims do not exceed a total of $75,000. We discuss this issue further in part III, *infra*.

8. The record of the proceedings in the Jefferson County Circuit Court that was provided to the district court following the removal of this case reveals that the parties engaged in considerable discovery between the filing of suit and June 20, 2006, the date plaintiffs filed their third amended complaint and added Alabama Power and Filler Products as defendants. Although the record does not include the discovery, it does indicate that the plaintiffs provided the defendants (with the exception of Alabama Power and Filler Products) with the location of the plaintiffs' properties and their residences. We do not know whether Alabama Power had access to this discovery prior to filing its notice of removal. What we do know is that Alabama Power cited nothing from such discovery in support of its notice of removal or in its subsequent argument to the district court in opposition to the plaintiffs' motion to remand the case to state court.

indicated the specific amount of damages the plaintiffs were actually claiming.[9] As an alternative ground for remanding the case, the plaintiffs asserted that the case fell within the "local controversy" exception to CAFA, 28 U.S.C. § 1332(d)(4).[10]

Alabama Power filed a supplement to its notice of removal on August 4, articulating three reasons why it believed the district court had subject matter jurisdiction over the case. First, the case involved claims of more than 100 persons. Second, to reach the required minimum total of $5,000,000 in value, each plaintiff's claims would need to yield only $12,500. Third, plaintiffs in recent mass tort actions in Alabama had received either jury verdicts or settlements for greater than $5,000,000.

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9. The motion to remand stated:

> Alabama Power Company's Notice of Removal assumes a specific minimum amount of damages necessary for removal under CAFA, $5,000,000, as being claimed by the Plaintiffs, even though the Plaintiffs' Complaint states none. Similarly, the Notice of Removal states that "each individual claim exceeds $75,000," whereas Plaintiffs' Complaint references no specific amount of damages.

The motion to remand did not challenge Alabama Power's representation that the diversity of citizenship required by CAFA was present. The presence of the requisite diversity, which we refer to as "minimal diversity," is not an issue in this appeal.

10. We refer to this exception, which plays no role in our disposition of this appeal, in parts III and VI, *infra*.

Appendix A

In addition to supplementing its notice of removal, Alabama Power moved the district court for leave to engage in discovery, attaching to its motion a proposed request for admissions, which we reproduce in the margin.[11] Alabama Power requested leave for discovery in the event the court felt that the $5,000,000 jurisdictional amount was not established by Alabama Power's notice of removal and supplement. On August 9, the plaintiffs responded to Alabama Power's discovery request by moving the district court "for leave to take . . . depositions of defendant corporations that [were] citizens of the state of Alabama." The plaintiffs sought leave to take these depositions in order to obtain evidence to support their invocation of CAFA's "local controversy" exception.

Two days later, on August 11, the district court held a hearing regarding its jurisdiction. The court did not limit its consideration to its jurisdiction over the claims of Alabama Power, but rather considered its jurisdiction

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11. The proposed request for admissions asked each plaintiff:

> 1. Admit that each individual plaintiff's claim exceeds $75,000. If you deny that any plaintiff's claim exceeds $75,000, please identify each and every plaintiff whose claim does not exceed $75,000 and state the precise amount of each such plaintiff's claim. 2. Admit that the matter in controversy meets or exceeds $5,000,000 exclusive of interest and costs.

over the action as a whole.[12] At the hearing, plaintiffs' counsel orally withdrew their motion to remand the case and conceded jurisdiction.[13] The court pressed plaintiffs' counsel on the issue, inquiring, "Lloyd, you and Bill seriously think that one or more of your 400 plaintiffs is going to have a shot at more than $75,000?" Plaintiffs' counsel responded, "One or more, Judge. All of them don't." Despite the plaintiffs' withdrawal of the motion to remand, the court concluded that it would take under advisement the issue of its subject matter jurisdiction. To that end, on August 16, the court ordered the plaintiffs

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12. At the hearing, the district court asked the assembled counsel for the named defendants whether there was any opposition to removal of the action. Hearing none, the court stated that "[y]ou are all in agreement then that Alabama Power Company has successfully removed this case over here. . . . I believe almost all of the 14 [defendants] are here. So you are happy to have one of your fellow defendants [drag] you over to the federal court." Although counsel maintained that CAFA did not require their clients to consent to Alabama Power's removal of the case, nine of the original defendants and Filler Products subsequently filed a written motion seeking to join in Alabama Power's removal. We discuss the removability of the claims against the various defendants in part II.B, *infra*.

13. The plaintiffs' concession came during a colloquy between the district court and counsel. Plaintiffs' counsel stated: "Judge, we would like to on behalf of the plaintiffs withdraw our motion to remand. It's fine with us to stay right here." When the court inquired about the pending motions for leave to take depositions and conduct limited discovery, counsel for Alabama Power responded, "The plaintiff is conceding the amount in controversy, Judge. That's no longer needed."

to file, under the constraints of Federal Rule of Civil Procedure 11,[14] the names of all plaintiffs whose claims could reasonably be expected to exceed $75,000.[15] In its

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14. Fed. R. Civ. P 11(b) provides, in relevant part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

15. Specifically, the court charged the plaintiffs with filing "the names and addresses of all plaintiffs whose claims can (Cont'd)

order, the court reserved ruling on Alabama Power's motion to engage in limited discovery.

The plaintiffs responded to the district court's August 16 order the same day it was issued, stating that they lacked sufficient information to admit or deny that each claim was worth $75,000. The next day, they moved the court to set aside its August 16 order or accept their response to that order as adequate. Then, at a hearing held on August 22, plaintiffs' counsel orally moved the court to reinstate their motion to remand, contending that they never conceded federal jurisdiction and that it was Alabama Power's burden to show that each plaintiff's claims amounted to more than $75,000 (as Alabama Power itself had asserted in its notice of removal). Although Alabama Power objected to the plaintiffs' attempt to reinstate their motion to remand, the district court reinstated the motion. Then, before adjourning the hearing, the court queried whether it had jurisdiction to litigate the claims against the defendants who had been made parties to the case prior to CAFA's effective date (the "pre-CAFA defendants") and asked counsel to brief the issue.

On August 29, Alabama Power filed a response to the plaintiffs' motion for reconsideration of the August 16 order. It contended that CAFA's $75,000 provision is

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reasonably be expected to exceed $75,000 in value, together with a one paragraph explanation for each said claim as to why it is worth more than $75,000, and what amount each said plaintiff believes his or her claim is reasonably worth."

an exception to the exercise of the court's jurisdiction, rather than a threshold jurisdictional requirement. In other words, Alabama Power argued that jurisdiction attaches upon a showing of at least 100 plaintiffs and a total amount in controversy exceeding $5,000,000 (after which the court must dismiss individual plaintiffs whose claims do not meet the $75,000 exception).[16] The plaintiffs replied to Alabama Power's response on September 11, contending that Alabama Power bore the burden of establishing that the claims of each individual plaintiff exceeded $75,000. The plaintiffs further asserted that Alabama Power had not demonstrated that the claims of even one plaintiff exceeded $75,000, or that the total amount in controversy exceeded $5,000,000. Finally, the plaintiffs—expanding upon the court's concerns about its power to entertain the claims against the pre-CAFA defendants—argued that the court lacked jurisdiction over the entire case because the action was originally filed prior to CAFA's effective date.

On October 12, 2006, the district court granted the plaintiffs' motion for reconsideration of its August 16 order and entered an order remanding the case to the

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16. In its August 29, 2006 response, Alabama Power noted that, while it had stated at the August 22 hearing that it bore the burden of establishing that $75,000 was in controversy as to at least one plaintiff, it later determined (purportedly under the plain meaning of CAFA) that it did not bear the burden of establishing that any of the plaintiffs' claims exceeded $75,000. Alabama Power contended that, assuming, *arguendo*, that it did bear the burden of establishing that at least one plaintiff's claims exceeded $75,000, it had satisfied that burden.

Jefferson County Circuit Court. Alabama Power moved the court to reconsider its decision, pointing out that some of the factual assertions in the memorandum opinion accompanying the October 12 order were incorrect.[17] The court granted the motion and issued a substitute order and accompanying memorandum opinion on October 24, 2006. *Lowery v. Honeywell Int'l Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006).[18]

In its October 24 memorandum opinion, the district court held that, as a threshold matter, it lacked jurisdiction over the claims against the defendants who had been made parties prior to CAFA's effective date.

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17. In its October 12 memorandum opinion, the court stated: "Nowhere in the original complaint, or in any subsequent amendment, does any plaintiff claim or otherwise designate a specific amount of damages, and all parties agree that few, if any, of the 418 plaintiffs have claims of more than $75,000 in value." In its motion for reconsideration, Alabama Power noted that this factual assertion was incorrect because the plaintiffs had made the following demand in the original complaint: "Each plaintiff demands judgment against said Defendants in the sum of one million two hundred fifty thousand dollars and costs." Furthermore, Alabama Power never agreed that "few, if any" of the plaintiffs had claims for more than $75,000.

18. In the October 24 memorandum opinion, the court noted the factual error Alabama Power had alluded to, but stated: "There is nothing in the original complaint to distinguish between a plaintiff who may be claiming severe lung disease from one who may be claiming grit in her grits." *Lowery*, 460 F. Supp. 2d at 1291. While the substitute opinion correctly noted the $1,250,000 *ad damnum* clause in the original complaint, the court adhered to its decision to remand the case to state court.

Hence, only Alabama Power and Filler Products were properly before the court. Addressing these defendants, the court observed that CAFA had not changed the rule that "when a state court complaint is uncertain or silent on the amount being sought, the removing defendant under 28 U.S.C. § 1332 has the burden of proving the jurisdictional amount by a preponderance of the evidence," *id.* at 1296, and held that Alabama Power had failed to prove that CAFA's jurisdictional amounts were satisfied.[19] That is, these defendants had shown neither that one plaintiff had claims in excess of $75,000, nor that all of the plaintiffs' claims exceeded $5,000,000 in the aggregate.[20]

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19. The district court rejected out of hand Alabama Power's argument that the plaintiffs were bound by the *ad damnum* clause of their original complaint, in which each claimed damages in the amount of $1,250,000. The court did so under the assumption that Alabama Power could not take advantage of what plaintiffs had sought against its co-defendants in their original complaint. "Alabama Power's argument is unconvincing because the action had not 'commenced' as to it when the original complaint was still in effect. The action did not so 'commence' as to Alabama Power until the third amended and recast complaint was filed, and by that time plaintiffs had eliminated any specification of damages being sought." *Lowery,* 460 F. Supp. 2d at 1296.

20. Having found that no plaintiff had claims totaling in excess of $75,000, the court sidestepped the question whether, if at least one plaintiff's claims satisfy that amount, the court could entertain the mass action provided the other jurisdictional requirements were met. The court stated: "This court, based on its experience and on the voluminous state court file, frankly

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Appendix A

Following the district court's remand order of October 12, 2006, Alabama Power, pursuant to CAFA's removal provision § 1453(c)(1),[21] moved this court on October 19, for leave to appeal.[22] On October 20, a group consisting of all but two of the pre-CAFA defendants did the same.[23] We granted both motions on December 8, 2006, and subsequently consolidated the appeals.

The defendants' appeals require us to address four distinct issues, and we address each in turn in the parts of this opinion that follow. In part II, we consider whether the removal of an action under CAFA by a defendant added as a party after CAFA's effective date removes the claims against all of the defendants in the action—including those claims brought before the effective date. Part III dissects CAFA's "mass action" provisions to

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doubts, despite plaintiffs' counsel's bravado on behalf of some of his unnamed clients, that any plaintiff's claim exceeds $75,000 in value, much less that all claims aggregate in excess of $5,000,000 in value, as required for a CAFA removal." *Id.* at 1297. Counsel simply "cannot be expected to know the values of their claims at this juncture." *Lowery*, 460 F. Supp. 2d at 1301. We address this question in part III.B, *infra*.

21. We discuss § 1453 in far greater detail in part II.B, *infra*. For present purposes, we note that § 1453(c)(1) allows for appeal from a district court order granting remand to state court.

22. Filler Products did not join in the motion.

23. ABC Acquisitions and Polymer Coil Coaters did not join in the motion.

identify the requirements for subject matter jurisdiction created by those provisions. In part IV, we set forth the applicable burden of proof in establishing subject matter jurisdiction in a removed case in which damages are unspecified, and we identify the party that bears this burden under CAFA. In part V, we determine what a district court may consider in reviewing the propriety of removal that is timely challenged by a motion to remand. This inquiry requires us to examine the significance of the existing removal procedures under 28 U.S.C. § 1446—which are incorporated, in part, by CAFA—as well as the propriety of post-removal discovery on the issue of jurisdiction. Part VI applies the relevant legal principles to the instant case. Finally, part VII briefly concludes.

II.

We review *de novo* the district court's decision to remand a case to state court for lack of subject matter jurisdiction. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006); *see* 28 U.S.C. § 1453(c)(1) (notwithstanding 28 U.S.C. § 1447(d), court of appeals may review remand order where case was removed under CAFA).

A.

Congress enacted CAFA to address inequitable state court treatment of class actions and to put an end to certain abusive practices by plaintiffs' class counsel. CAFA § 2, 119 Stat. at 5. CAFA seeks to address these

inequities and abusive practices by, among other things, broadening federal diversity jurisdiction over class actions with interstate implications. CAFA § 2, 119 Stat. at 5; *see also Miedema*, 450 F.3d at 1329 ("[T]he text of CAFA plainly expands federal jurisdiction over class actions and facilitates their removal[.]").

CAFA amends the federal diversity jurisdiction statute, 28 U.S.C. § 1332, by inserting a new subsection, § 1332(d). This new subsection works a sea change in diversity jurisdiction for certain class actions. It broadens diversity jurisdiction by establishing lower threshold requirements for jurisdiction and abrogating long-established precedent.[24] Subject to certain

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24. Following the enactment of CAFA, federal courts no longer look to the familiar requirements of 28 U.S.C. § 1332(a) to determine if the court has diversity jurisdiction over certain class actions. Instead, federal courts now look to § 1332(d)(2).

Prior to CAFA, the Supreme Court had interpreted the "diversity" requirement of § 1332(a) to require that each named member of the plaintiff class be diverse from each of the defendants. *See Snyder v. Harris*, 394 U.S. 332, 340, 89 S. Ct. 1053, 1059, 22 L. Ed. 2d 319 (1969); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673 (1921). The new § 1332(d) replaces *Ben-Hur*'s modified "complete diversity" requirement with a "minimal diversity" requirement under which, for purposes of establishing jurisdiction, only one member of the plaintiff class—named or unnamed—must be diverse from any one defendant. § 1332(d)(2).

Before CAFA, the claims of a class of plaintiffs were not permitted to be aggregated for purposes of satisfying the (Cont'd)

exceptions designed to keep purely local matters and issues of particular state concern in the state courts, § 1332(d)(3) to (5), CAFA provides federal courts with jurisdiction over class actions provided that: the number of plaintiffs in all proposed plaintiff classes exceeds one hundred, § 1332(d)(5)(b); any member of the plaintiff class is diverse from any defendant, § 1332(d)(2); and the aggregate of the claims of individual class members exceeds $5,000,000, exclusive of interests and costs. § 1332(d)(2), (6); *see also Miedema*, 450 F.3d at 1327; *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006).

In this part, we discuss the issues related to the proper interpretation of CAFA's removal provisions raised by the present dispute. In part III, *infra*, we

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jurisdictional amount requirement of § 1332(a) and, therefore, federal courts did not have jurisdiction over the claims of any individual plaintiffs that failed to satisfy the jurisdictional amount. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973); *Snyder*, 394 U.S. at 340, 89 S. Ct. at 1059. *But see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (holding—approximately four months after CAFA's enactment—that under the 1990 supplemental jurisdictional statute, 28 U.S.C. § 1367, a federal court has supplemental jurisdiction over claims of class members failing to meet § 1332(a)'s jurisdictional amount provided that the claims of a single plaintiff in the class action meet the amount in controversy). CAFA replaces this "non-aggregation" principle with an amount in controversy requirement that explicitly permits aggregation of claims. § 1332(d)(6).

address in greater detail the requirements that must be met for the district court to have subject matter jurisdiction over a mass action under CAFA.

B.

We must first address whether the pre-CAFA defendants could, as a procedural matter, properly join in the removal to federal court initiated by Alabama Power. Alabama Power alone among the defendants removed this action while the other defendants—at first passively and then explicitly—rode Alabama Power's coattails into the district court. What the district court had before it in considering the propriety of removal was limited to those documents provided by Alabama Power in seeking removal.

The issue here arises because the plaintiffs amended their complaint to add Alabama Power and Filler Products as defendants on June 20, 2006—after CAFA became law. *See* CAFA § 9, 119 Stat. at 14 ("The amendments made by this Act shall apply to any civil action commenced on or after . . . February 18, 2005."). Alabama Power filed a notice of removal, in which nearly all the other defendants later joined,[25] citing as a basis

25. The district court never specifically addressed the issue of removal as to the remaining three defendants—Allied Signal, Inc., ABC Acquisitions, and Polymer Coil Coaters—who did not seek joinder. But the court did note disapprovingly in its substitute order of October 24, 2006 that Filler Products had never itself filed a timely notice of removal in accordance with

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for federal jurisdiction CAFA's provisions pertaining to "mass actions" under § 1332(d)(11). The plaintiffs argue, and the district court held, that because the action against the pre-CAFA defendants "commenced" before the Act's effective date, those defendants could not join in the removal, regardless of whether Alabama Power was itself entitled to remove the action.

1.

Removal of state court actions to federal court involves both jurisdictional and procedural considerations. *See Ariail Drug Co., Inc. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933 (11th Cir. 1997); *Monroe v. United Carbon Co.*, 196 F.2d 455, 456 (5th Cir. 1952).[26] For the purpose of our present discussion of removal procedure, however, we observe that CAFA's jurisdictional and procedural provisions operate in tandem with regard to removal. The availability of federal jurisdiction created by CAFA in § 1332(d), and

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the procedural requirements of 28 U.S.C. § 1446 (which are adopted by CAFA's removal section, 28 U.S.C. § 1453). Because we conclude that Alabama Power could procedurally remove the action as a whole, including all defendants, we need not concern ourselves with the circumstances pertinent to each named defendant.

26. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the Act's procedural removal provisions under § 1453, both depend on whether a given suit constitutes a "class action" as defined by the statute.

The terminology of the statute can be somewhat convoluted, so we track it methodically. Alabama Power removed this action as a mass action under CAFA. § 1332(d)(11). Under that subsection, "a mass action shall be deemed to be a class action" subject to certain other CAFA provisions. § 1332(d)(11)(A). We discuss the substantive jurisdictional import of § 1332(d)(11)(A) in much greater detail in part III.B, *infra*, but for our present purposes it is important to note that the plain language of the provision makes it clear that any "mass action" is also considered a "class action" for the purposes of CAFA's removal provisions.[27] CAFA generally creates federal jurisdiction over "any civil action" that meets the various jurisdictional requirements and "is a class action." § 1332(d)(2). CAFA's procedural removal section, § 1453, adopts the "class

27. A "mass action" is considered a "class action" only insofar as the latter term is used throughout CAFA to describe those actions over which the Act creates expanded diversity jurisdiction. By its own terms, the statute defines mass action specifically to exclude formal class actions brought under Fed. R. Civ. P. 23 or analogous state rules or statutes. § 1332(d)(11)(B) (citing, as an exception from the "mass action" definition, any "class action" defined by 28 U.S.C. § 1711(2)). Congress's peculiar drafting in this regard gives mass actions the character of a kind of statutory Janus; under CAFA, a mass action simultaneously *is* a class action (for CAFA's purposes) and *is not* a class action (in the traditional sense of Rule 23 and analogous state law provisions).

action" definition of CAFA's substantive section, § 1332(d), and provides for removal of "[a] class action . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants." § 1453(a), (b). Importantly, § 1453 otherwise adopts the procedural requirements of the general removal statute, 28 U.S.C. § 1446. § 1453(b). While adopting § 1446 generally, § 1453 expands the availability of removal by eliminating the one-year limited removal period for diversity suits. § 1453(b). The import of the shared "class action" definition in CAFA's various provisions is that any lawsuit that meets the jurisdictional requirements of a "mass action" is also a removable "class action."

2.

With that background, we now must determine whether the claims against the pre-CAFA defendants were properly included in the removal to the district court. Although the plaintiffs dispute whether CAFA's provisions apply to the claims against the pre-CAFA defendants, they have not argued that CAFA is wholly inapplicable to the entire case. In other words, plaintiffs do not dispute that CAFA applies to Alabama Power, which was added as a defendant after CAFA's effective date.[28] Thus, we consider only whether the pre-CAFA

28. CAFA applies to "any civil action commenced on or after" its effective date. CAFA § 9, 119 Stat. at 14. Courts have separately considered whether an action "commences" as to a (Cont'd)

defendants can, under CAFA's procedural removal provisions, "tag along" with Alabama Power's removal to federal court.

We conclude that, in light of the plain language of CAFA, removal under the statute encompasses all the claims in the "action" as a whole, not simply the claims against a removing defendant. Both the substantive and procedural sections of CAFA dealing with removal of mass actions refer to removal of the "class action."[29] *See* § 1332(d)(11)(A) ("[A] mass action shall be deemed to be a class action[.]"); § 1453(b) ("A class action may be removed to a district court[.]"). The statute's reference to "actions," as opposed to "claims," suggests that removal under CAFA is broadly inclusive. *See Braud v. Transport Serv. Co.*, 445 F.3d 801, 808 (5th Cir. 2006) ("[I]t is the 'action,' not claims against particular defendants, that is removable.") (citing *Dinkel*

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newly added defendant—thus making CAFA applicable to that defendant—when a plaintiff amends its pre-CAFA complaint to add the defendant after the Act's effective date. *See, e.g., Braud v. Transport Serv. Co.*, 445 F.3d 801, 803-08 (5th Cir. 2006). That question is determined by reference to state law, but because the parties here do not dispute the applicability of CAFA to Alabama Power, we need not consider it. *See Tmesys, Inc. v. Eufaula Drugs, Inc.*, 462 F.3d 1317, 1319 (11th Cir. 2006) (noting that commencement of an action under CAFA is determined by state law).

29. *See infra* note 41.

v. Gen. Motors Corp., 400 F. Supp. 2d 289, 294 (D. Me. 2005)).[30] Furthermore, a class action removable under CAFA "may be removed by any defendant without the consent of all defendants." § 1453(b). Read together, these provisions establish that one defendant may remove the entire action, including claims against all defendants, using the procedures established by § 1453 and the incorporated provisions of § 1446. *See id.* ("The language of CAFA is plain that any single defendant can remove (without the consent of the other defendants) the entire class action (not merely the claims against that defendant)."); *Kitson v. Bank of Edwardsville*, No. 06-528, 2006 WL 3392752, at *3 (S.D. Ill. Nov. 22, 2006) (slip op.) ("The clear language of the statute permits the removal of a 'class action,' regardless of whether specific claims asserted in the action are removable or not."); *Robinson v. Holiday Universal, Inc.*, No. 05-5726, 2006 WL 470592, at *3 (E.D. Pa. Feb. 23, 2006) (unpublished) (post-CAFA defendant "removed the entire class action and not just the claims against it" where, at the time of the filing of the notice of removal, "all of the jurisdictional

30. The district court attempted to distinguish the Fifth Circuit's decision in *Braud* from this case by noting that *Braud* concerned CAFA's treatment of a formal class action, not a mass action under § 1332(d)(11). But as we have noted, the statute defines a "mass action" to be a "class action" for purposes of removal. § 1332(d)(11)(A). Of course, *Braud* does not speak to the issue of jurisdiction under the mass action provisions of § 1332(d)(11), but we see no reason why *Braud*'s analysis of removal procedure under CAFA—which operates equally with regard to formal class actions and mass actions—is not persuasive here.

requirements of CAFA were then met"); *cf. Evans*, 449 F.3d at 1161 (noting that four out of eighteen defendants removed the case). *Contra Brown v. Kerkhoff*, No. 05-00274, 2005 WL 2671529, at *16 (S.D. Iowa Oct. 19, 2005) (unpublished). The principle that one defendant may remove the action as a whole holds true even where, as here, the removing defendant was added after CAFA's effective date to an action that was filed against other defendants before CAFA was enacted. *See Braud*, 445 F.3d at 808 (holding that, where the removing defendant was added after CAFA's effective date and then was later dismissed from the action, the district court could properly maintain jurisdiction over the "action" with regard to the remaining pre-CAFA defendants).

3.

Our interpretation of the removal language in CAFA is consistent with the Act's overall statutory purpose, as well as removal practice outside the CAFA context. *See Smith v. United States*, 508 U.S. 223, 233, 113 S. Ct. 2050, 2056, 124 L. Ed. 2d 138 (1993) (instructing that, in matters of statutory interpretation, we must construe statutory provisions not in isolation, but in light of the statute as a whole); *Dinkel*, 400 F. Supp. 2d at 293 (noting that, under removal practice generally, "the entire lawsuit is removable or not removable, not merely the claims against particular defendants"). First, as to the statutory purpose, Congress expressly intended CAFA to expand federal diversity jurisdiction over class actions. CAFA § 2, 119 Stat. at 5. To read the plain language of the removal provisions narrowly, such that

removal would only be available as to claims against the particular removing defendants, would frustrate congressional intent that CAFA be used to provide for more uniform federal disposition of class actions affecting interstate commerce. CAFA § 2, 119 Stat. at 5. As a result of such a reading, certain defendants in a lawsuit could unilaterally elect to have the claims against them heard in a federal court while other defendants would be excluded from that forum, notwithstanding that all the claims against both sets of defendants arose from the same group of plaintiffs on common issues of law and fact. Such a result would run counter to the express purposes of CAFA.

Second, as to non-CAFA removal practice generally, we have previously read a similar removal provision as extending the scope of removal to encompass entire actions, not just individual claims. *See In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1258-60 (11th Cir. 1992). In our *Surinam Airways* decision, a panel of this court interpreted the language of the jurisdictional provision in 28 U.S.C. § 1441(d)—which creates removal jurisdiction over "[a]ny civil action . . . against a foreign state"—in light of plain language and legislative intent. *Id.* at 1258. We noted that "such open-ended language as 'any civil action' does not always serve to affirmatively grant jurisdiction over an entire case." *Id.* at 1259. Nevertheless, our examination of the legislative intent, coupled with the lack of any express limitation on the plain language, led us to conclude that the statute's grant of removal jurisdiction over "any civil action" encompassed claims by or against other parties in the

same lawsuit. *Id.* at 1259-60. In *Surinam Airways*, the removal provision at issue, which had been enacted as part of the Foreign Sovereign Immunities Act, was intended "to give foreign states the discretion to use a federal forum to litigate civil actions into which they have been brought" for the purpose of encouraging uniformity in that area of law. *Id.*

Although the context of CAFA is, of course, quite different from the Foreign Sovereign Immunities Act, the reasoning behind our interpretation of the latter statute's removal scheme is analogous. Congress intended CAFA to encourage the litigation of certain class actions—"cases of national importance"—in federal courts, so as to minimize bias against out-of-state defendants and promote the fair application of state law to the multifarious parties in class actions. CAFA § 2, 119 Stat. at 5. As in the case of § 1441(d), CAFA's purposes encourage a reading that makes more inclusive the scope of its removal provisions, not less inclusive. In light of that expansive construction of the removal provisions, we conclude that the district court erred in holding that the pre CAFA defendants were not properly included in Alabama Power's removal. Because we read CAFA's jurisdictional and procedural removal provisions to relate to the "class action" and not particular claims, the removal of the claims against all the defendants either stands or falls as a whole. We now turn our attention to the requirements set forth by CAFA for a district court to have subject matter jurisdiction over a mass action.

III.

The defendants contend that the district court's remand order was improper because this action meets the requirements for federal diversity jurisdiction under CAFA. As discussed above, CAFA does not apply exclusively to class actions certified under Rule 23 or state analogues.[31] CAFA's mass action provisions extend federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs. 28 U.S.C. § 1332(d)(11).[32] In the present suit, the plaintiffs did not seek class certification.

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31. If CAFA's application were limited to traditional class actions, the defendants, here, would be required to meet the far more stringent jurisdictional thresholds of 28 U.S.C. § 1332(a). That section states two requirements: (1) that the parties be diverse; and (2) that the amount in controversy threshold—currently $75,000—be met. Section 1332(a)'s diversity requirement has been interpreted to require "complete diversity" among the parties. *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806)). Section 1332(a)'s amount in controversy requirement does not allow the claims of multiple plaintiffs to be aggregated to reach the jurisdictional threshold, *see Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301, 94 S. Ct. 505, 512, 38 L. Ed. 2d 511 (1973), and the claims of at least one of the individual plaintiffs must exceed the amount in controversy threshold for the court to assert jurisdiction. *Exxon Mobil Corp. v. Allapattah Svcs, Inc.*, 545 U.S. 546, 559, 125 S. Ct. 2611, 2620, 162 L. Ed. 2d 502 (2005) (holding that if the claims of a single plaintiff meet the jurisdictional threshold the court may assert supplemental jurisdiction over additional plaintiffs' claims).

32. In extending CAFA to large individual state court cases (Cont'd)

Appendix A

The plaintiffs assert that this action does not qualify for treatment as a mass action. The defendants contend that the action, while not certified as a class action under either federal or state law, is nonetheless a class action for purposes of CAFA because it satisfies CAFA's mass action requirements. In large part, this dispute can be attributed to the parties' divergent interpretations of what requirements an action must meet under CAFA to qualify as a mass action.

CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation,[33] even though they are contained in a single paragraph of the amended diversity statute, 28 U.S.C. § 1332(d)(11), and are comprised of but four sub-paragraphs, only two of which are relevant for our

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that are functionally indistinguishable from class actions, the mass action provision prevents plaintiffs' counsel from avoiding CAFA's expanded federal jurisdiction by simply choosing not to seek class certification. *See* S. Rep. No. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44 (noting that "mass actions are simply class actions in disguise").

33. The district court aptly described the interpretational difficulties presented by this section of CAFA as a "Gordian knot." *Lowery v. Honeywell Intern., Inc.*, 460 F. Supp. 2d 1288, 1293 (N.D. Ala. 2006). In *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), the Ninth Circuit described the wording of one mass action provision, 28 U.S.C. § 1332(d)(11)(a), as "clumsy" and noted that meshing the mass action provisions with the rest of § 1332 is "far from straightforward[,]" before declining to wade into this interpretational quagmire. *Id.* at 681-82.

purposes. 28 U.S.C. § 1332(d)(11)(A),(B).[34] The proper interpretation of CAFA's mass action provisions is a matter of first impression in this circuit. Thus, to resolve the current dispute, we are tasked with plotting the proper route through this statutory labyrinth. We turn to that now.

A.

In interpreting a statute, we look first to the statute's plain meaning and, if the statutory language is facially unambiguous, our inquiry comes to an end. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992); *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("We begin our construction . . . where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision."). We begin, therefore, by setting forth the relevant statutory provisions and looking to the plain meaning of the language.

1.

The relevant substantive mass action provisions are found in § 1332(d)(11). As we noted in discussing its implications for removal in part II.B, *supra*, sub-paragraph (d)(11)(A) states that: "For purposes of

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34. The two remaining mass action sub-paragraphs address the transfer of mass actions by the panel on multi-district litigation, 28 U.S.C. § 1332(d)(11)(C), and the tolling of statutes of limitations in mass actions. 28 U.S.C. § 1332(d)(11)(D).

[28 U.S.C. § 1332(d)] and [CAFA's removal provisions], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." 28 U.S.C. § 1332(d)(11)(A).

On its face, sub-paragraph (d)(11)(A) serves two functions. First, the provision states that for the purposes of the CAFA amendments to the diversity jurisdiction statute, a mass action "shall be deemed a class action." § 1332(d)(11)(A). This language makes it clear that a mass action is to be treated as a class action, despite not meeting CAFA's definition of a class action under § 1332(d)(1)(B).[35]

Second, § 1332(d)(11)(A) comes with a proviso: a mass action is only deemed a class action "if it otherwise meets the provisions of [§ 1332(d)(2) through (10).]" This language conditions a mass action's treatment as a class action on the mass action conforming with eight additional statutory provisions, § 1332(d)(2) through (10).

These incorporated provisions cover a variety of terrain. Some act to limit CAFA's expansion of federal diversity jurisdiction by authorizing a district court to decline jurisdiction over certain cases that may lack

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35. As we noted in part II.B, *supra*, for purposes of CAFA, a class action is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by [one] or more representative persons as a class action[.]" 28 U.S.C. § 1332(d)(1)(B).

significant interstate impact,[36] or by creating an

36. Section 1332(d)(3) provides, in relevant part:

> A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—
>
> (A) whether the claims asserted involve matters of national or interstate interest;
>
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

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exception to jurisdiction for matters likely to be purely local controversies.[37] Other provisions create additional

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> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3).

37. Plaintiffs raised this "local controversy" exception as an alternative basis for remand. Section 1332(d)(4) provides, in relevant part:

> A district court shall decline to exercise jurisdiction . . .—
>
> (A)(i) over a class action in which—
>
> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant is a defendant—
>
> (aa) from whom significant relief is sought by members of the plaintiff class;
>
> (bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

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exceptions to jurisdiction in suits against states and state officials[38] and in certain securities litigation.[39] Some

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> (cc) who is a citizen of the State in which the action was originally filed; and
>
> (III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
>
> (ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or
>
> (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

28 U.S.C. § 1332(d)(4).

38. Section 1332(d)(5)(A) provides that CAFA jurisdiction, as well as the two local controversy limitations on CAFA jurisdiction, "shall not apply to any class action in which . . . the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief[.]" 28 U.S.C. § 1332(d)(5)(A).

39. Section 1332(d)(9) provides:

> [CAFA jurisdiction] shall not apply to any class action that solely involves a claim—

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provide guidance on the treatment of citizenship under CAFA.[40] Finally, some provisions, despite being

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> (A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> (B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or
>
> (C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1332(d)(9).

40. Section 1332(d)(7) sets forth how citizenship shall be determined in CAFA class actions, providing that:

> Citizenship of the members of the proposed plaintiff classes shall be determined . . . as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

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incorporated into the mass action context by § 1332(d)(11)(A), seem to have no application to mass actions.[41]

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28 U.S.C. § 1332(d)(7). Section 1332(d)(10) sets forth how the citizenship of unincorporated associations is treated for purposes of CAFA's jurisdictional and removal provisions, stating "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. § 1332(d)(10).

41. Despite being specifically applied to mass actions through § 1332(d)(11)(A), § 1332(d)(8) clearly has no application outside the certified class action context. That provision specifically addresses the timing of class certification, stating that § 1332(d) generally applies "to any class action before or after the entry of a class certification order by the court with respect to that action." § 1332(d)(8). An action qualifying as a mass action would not, by definition, have a class certification order, § 1332(d)(11)(B)(i). Section 1332(d)(8), therefore, is never applicable to a mass action. Moreover, the application to the mass action context of several of the other provisions incorporated by § 1332(d)(11)(A) is questionable. The language of these individual provisions could also be read to be applicable to only a certified class. For example, while § 1332(d)(11)(B)(i) creates a numerosity requirement specifically for mass actions, it is unclear how the class action numerosity requirement would be applied to mass actions through § 1332(d)(11)(A). *See* 28 U.S.C. § 1332(d)(5) ("Paragraphs (2) through (4) shall not apply to any class action in which . . . the number of members of all *proposed plaintiff classes* in the aggregate is less than 100.") (emphasis added). Regardless of how this tension is to be reconciled, however, on its face, § 1332(d)(11)(A) clearly subjects mass actions to the affirmative requirements of § 1332(d)(2) and, therefore, a mass action must have minimally diverse parties and must meet the $5,000,000 amount in controversy requirement.

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Most importantly for our purposes, § 1332(d)(11)(A) incorporates into the mass action context a number of the requirements for a class action to qualify for CAFA diversity jurisdiction. Thus, for a mass action to be deemed a class action, the plaintiffs' claims must exceed an aggregate of $5,000,000, 28 U.S.C. § 1332(d)(2),(6),[42]

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These seemingly non-applicable provisions are not the only reason the Ninth Circuit described § 1332(d)(11)(A) as "clumsy." *Abrego Abrego*, 443 F.3d at 681. Section 1332(d)(11)(A) provides that a mass action will be deemed a "class action *removable* under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs." 28 U.S.C. § 1332(d)(11)(A) (emphasis added). It would seem, if one looked solely to this provision, that Congress intended to confer only removal jurisdiction over mass actions. The provision clearly states that mass actions are removable and makes no mention of original jurisdiction. In tension with this reading of the provision, however, is clear language that likewise subjects mass actions to the requirements of § 1332(d)(2) to (10). The tension arises because § 1332(d)(2) grants the district courts "original jurisdiction of any civil action which [meets CAFA's diversity and amount in controversy requirements.]" 28 U.S.C. § 1332(d)(2). It is not clear, therefore, whether a group of plaintiffs who, choosing not to certify as a class, but otherwise meeting the requirements for a mass action, would be permitted to file a mass action originally in a district court. As the present dispute is before us on appeal from a motion to remand, we need not address whether a mass action may be filed as an original action in district court. There is no dispute that 28 U.S.C. § 1332(d), at a minimum, provides the district court with removal jurisdiction over a mass action.

42. Section 1332(d)(2) grants the district courts "original jurisdiction of any civil action in which the matter in controversy

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and the parties must be minimally diverse, 28 U.S.C. § 1332(d)(2).[43]

2.

The second mass action provision, subparagraph (d)(11)(B)(i), defines a mass action:

> As used in [§ 1332(d)(11)(A)], the term "mass action" means any civil action (except a civil

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exceeds the sum or value of $5,000,000, exclusive of interest and costs[,]" 28 U.S.C. § 1332(d)(2), while § 1332(d)(6) allows the claims of all the class members to be aggregated. § 1332(d)(6) ("In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.").

43. Under § 1332(d)(2), provided the other CAFA requirements are met, a district court has jurisdiction over a class action when:

> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2).

> action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

28 U.S.C. § 1332(d)(11)(B)(i).[44]

This sub-paragraph begins by excluding from the definition of mass actions those civil actions that fall within the scope of 28 U.S.C. § 1711(2). Section 1711(2) provides:

> The term "class action" means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

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44. Sub-paragraph (d)(11)(B)(ii), while also addressing the definition of mass actions, is not relevant for our present purposes. This provision specifically exempts certain actions from § 1332(d)(11)(B)(i)' s definition of a mass action. 28 U.S.C. § 1332(d)(11)(B)(ii). The current action does not fall under any of these exceptions.

28 U.S.C. § 1711(2). Thus, § 1332(d)(11)(B)(i) makes clear that a class action certified under Rule 23, or a state equivalent to Rule 23, is not a mass action. Actions meeting the definition of § 1711(2) meet the requirements of CAFA's class action provisions, § 1332(d)(1), and can qualify for CAFA's expanded jurisdictional thresholds without resorting to the mass action provisions in § 1332(d)(11).

This exception in § 1332(d)(11)(B)(i) is followed by two affirmative requirements for a civil action to qualify as a mass action. First, there is a numerosity requirement: a mass action must involve the proposed "monetary relief claims of 100 or more persons[.]" 28 U.S.C. § 1332(d)(11)(B)(i).[45] Second, there is a commonality requirement: "the plaintiffs' claims [must] involve common questions of law or fact[.]" 28 U.S.C. § 1332(d)(11)(B)(i).[46]

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45. This provision also appears to limit mass actions to suits seeking monetary relief. The definition, therefore, does not extend to actions seeking solely equitable relief. The CAFA provisions applicable to Rule 23 class actions and state equivalents do not contain a similar limitation. 28 U.S.C. § 1332(d)(1) to (10).

46. In requiring that the plaintiffs' claims involve common questions of law or fact, this provision extends to mass actions a requirement shared by traditional class actions, Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . there are questions of law or fact common to the class[.]"), and a prerequisite to permissive joinder under Fed. R. Civ. P. 20(a) ("All

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Appendix A

Combining the requirements drawn from § 1332(d)(11)(B)(i)'s definition of a mass action and those drawn from § 1332(d)(11)(A)'s incorporation of CAFA's class action requirements into the mass action context, we now have identified at least four requirements for an action to be deemed a mass action. These requirements are: (1) an amount in controversy requirement of an aggregate of $5,000,000 in claims; (2) a diversity requirement of minimal diversity; (3) a numerosity requirement that the action involve the monetary claims of 100 or more plaintiffs; and (4) a commonality requirement that the plaintiffs' claims involve common questions of law or fact.

Despite some minor tensions in the provisions discussed, it is clear from the plain language of the text that for an action to qualify as a mass action, at least these four requirements must be met. While the parties here dispute whether these four requirements have been satisfied—and who bears the burden of showing that the requirements have been met—they do not dispute that each is a threshold requirement to federal court jurisdiction over a mass action.

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persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.").

B.

This brings us to the interpretational heavy-lifting. Unlike the four requirements we have identified, the proper interpretation of the final clause of § 1332(d)(11)(B)(i)'s definition of a mass action is disputed. This clause states certain conditions under which jurisdiction will exist over a mass action "*except* that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). Under § 1332(a), the current amount in controversy threshold is $75,000.[47]

1.

The parties dispute the meaning of the $75,000 provision. The defendants argue that in choosing the word "except," Congress intended to create an exception to mass action diversity jurisdiction—that Congress intended to use "except" to mean "to the exclusion of." The plaintiffs, on the other hand, argue that Congress intended "except" to be read as "only." Under the former approach, the $75,000 would seem to serve as an

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47. CAFA thus incorporates both an individual and an aggregate amount in controversy for mass actions. For the sake of clarity, for the remainder of this discussion, we refer to this incorporation of § 1332(a)'s amount in controversy requirement as the "$75,000 provision" or the "individual amount in controversy provision" and to the requirement of 28 U.S.C. § 1332(d)(2), (6) as the "aggregate amount in controversy requirement."

exception to jurisdiction, while under the latter, it would appear to be a threshold requirement.

The glosses each party seeks to put on congressional use of the word "except" comport with well known definitions of the word. *Webster's Third New International Dictionary* 791 (1976) provides numerous definitions for the word "except," including definitions consistent with the defendants' interpretation—"with the exclusion or exception of"—and the plaintiffs'—"only." Congressional intent in using the term, therefore, cannot be divined from looking to that passage alone.

The defendants address this apparent ambiguity by arguing that the provision serves as an exception. Thus, a district court has diversity jurisdiction over a civil action as a whole if the aggregate jurisdictional amount, minimal diversity, numerosity and commonality requirements are met. Under these circumstances, the district court has jurisdiction over the action, but it lacks jurisdiction over an individual plaintiff whose claims do not exceed $75,000. The claims of these individual plaintiffs must be returned to state court. Under this reading, the numerosity and aggregate amount in controversy requirements are threshold requirements measured at the time of removal, while the $75,000 provision is treated as an exception addressed on a plaintiff-by-plaintiff basis after the action is removed.

The difficulty with the defendants' approach is that under this view the district court could retain jurisdiction over an action even if, in eliminating individual claims,

the total number of plaintiffs in the action fell below 100 or the aggregate total of the remaining plaintiffs' claims fell below $5,000,000. Indeed, in the most extreme example under the defendants' interpretation, the district court would retain jurisdiction over the action even if only a single plaintiff remained with claims in excess of $75,000.

The plaintiffs, on the other hand, argue that Congress intended "except" to mean, in effect, "only." Under this reading, the $75,000 provision does not function as an exception, but as an additional primary requirement. Jurisdiction over a mass action would, therefore, only be proper if the four previously identified requirements were met and each of the individual plaintiffs had claims that exceeded $75,000.

The difficulty with the plaintiffs' argument is that, if the $75,000 provision creates an initial jurisdictional requirement—if, in other words, in the current context, the district court must consider the $75,000 provision in assessing the removability of the action as a whole—then the aggregate amount in controversy requirement is surplusage. If there are 100 individual plaintiffs, as there must be under the numerosity requirement of § 1332(d)(11)(B)(i), and if their individual claims cannot be removed unless the claims of each plaintiff exceed $75,000, then one need not even resort to a calculator to deduce that the aggregate value of the claims of each of the 100 plaintiffs would be, at a minimum, $7,500,000. This approach negates the need for the $5,000,000 aggregate amount in controversy requirement of

§ 1332(d)(2), which is applied to mass actions through § 1332(d)(11)(A). Every civil action satisfying the numerosity requirement and the $75,000 provision would exceed $5,000,000 in the aggregate.

The district court, accepting the plaintiffs' argument, viewed the $75,000 inquiry as a threshold jurisdictional requirement. The court noted the tension between the $75,000 provision and the other mass action provisions and reasoned that "[i]f there is internal inconsistency in CAFA, that inconsistency must be resolved by giving predominance to the language that limits jurisdiction, and not to language that would expand it." *Lowery v. Honeywell Int'l Inc.*, 460 F. Supp. 2d 1288, 1294 (N.D. Ala. 2006). The district court thus viewed the $75,000 inquiry as part of the inquiry into the removability of the action as a whole. *Id.* at 1293-94. The court did not discuss the effect this interpretation would have on the salience of the $5,000,000 aggregate requirement.

2.

When the meaning of statutory language cannot be divined from the face of the statute, we turn first to intrinsic aids to interpretation. Here, we rely on two well-established rules of statutory construction. First, we must construe the statute to give effect, if possible, to every word and clause. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166-68, 125 S. Ct. 577, 583-84, 160 L. Ed. 2d 548 (2004); *Jaggernauth v. U.S. Atty. Gen.*, 432 F.3d 1346, 1354 (11th Cir. 2005). Second, in determining the proper interpretation of a

statutory provision, we must view the provision in the context of the statute as a whole. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, __, 126 S. Ct. 1252, 1257, 163 L. Ed. 2d 1079 (2006).

The interpretation given CAFA by the district court, and urged by the plaintiffs, would fail to give effect to every word and clause in CAFA. The $5,000,000 aggregate amount in controversy threshold would be rendered mere surplusage. By rejecting the interpretation proposed by the plaintiffs, we avoid this result.

Moreover, the context of CAFA as a whole counsels against the interpretation urged by the plaintiffs. As we observed, § 1332(d)(11)(A) incorporated for mass actions the jurisdictional grant of § 1332(d)(2).[48] That section states that "[t]he district court shall have original jurisdiction of *any civil action* in which the matter in controversy exceeds the sum or value of $5,000,000 . . . and is a class action in which [there is minimal diversity.]" § 1332(d)(2) (emphasis added). This provision grants the district courts jurisdiction over the actual case and, moreover, § 1332(d)(6) directs the courts to aggregate individual plaintiff's claims in determining if the $5,000,000 threshold is satisfied. By the terms of § 1332(d)(11)(B)(i), a mass action is, again, defined as "*any civil action*" for which the numerosity and

48. Again, we note that we do not here resolve the tension between § 1332(d)(2)'s original jurisdiction language and § 1332(d)(11)(A)'s reference of removability.

commonality requirements are met. 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). As such, in setting forth four of the five potential requirements for a mass action, the statute explicitly treats the civil action as a whole.

By contrast, the $75,000 provision states "that jurisdiction shall exist only over *those plaintiffs* whose *claims* in a mass action [exceed $75,000]." 28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). This language seems to refer to individual plaintiffs and their claims, not to the civil action as a whole. Thus, read in the context of these other provisions, it seems clear that the $75,000 provision was not intended to bar district courts from asserting jurisdiction over the entire case if each individual plaintiff's claims do not exceed $75,000.

C.

Though we conclude that, with use of the familiar canons of statutory construction, the meaning of the disputed provision becomes clear, we recognize that reasonable jurists often disagree on the clarity such canons can bring to statutory language. *See Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 746-47 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of reh'g en banc) (noting that courts had found multiple "plain meanings" in the same language of 28 U.S.C. § 1367, while still other courts had found ambiguity). When ambiguity in a statute renders congressional intent unclear, and that lack of clarity can not be resolved through the sort of intrinsic aids we have employed here,

it is appropriate to resort to extrinsic aids such as legislative history. *See Exxon Mobil Corp. v. Allapattah Svcs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2625-27, 162 L. Ed. 2d 502 (2005) (recognizing the occasional need for, and limitations of, legislative history as an extrinsic aid when confronted with statutory ambiguity). Though we are mindful that it is error to cloud the plain meaning of a statutory provision with contrary legislative history, where, as here, the legislative history comports with the interpretation that has been adopted, and where there is a potential that others may find ambiguity where we have found plain meaning, caution and completeness counsel that we discuss the statute's legislative history. *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc).

The Supreme Court "has repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those [Members of Congress] involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 483, 83 L. Ed. 2d 472 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S. Ct. 314, 324, 24 L. Ed. 2d 345 (1969)). As such, we look to Senate Report 109-14 from the Senate Judiciary Committee. S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.[49]

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49. CAFA was not referred to committee by the House. Instead, after Senate passage of CAFA, the bill was referred to the floor of the House for a vote. *See* H.R. 96, 109th Cong. (2005) (Cont'd)

Appendix A

The Senate Judiciary Committee Report squarely confronts how the tension between the mass action provisions is to be resolved.[50] In discussing 28 U.S.C. § 1332(d)(11), the report states:

> If a mass action satisfies the criteria set forth in the section (that is, it involves the monetary relief claims of 100 or more persons that are proposed to be tried jointly on the ground that the claims involve common questions of law or fact and it meets the tests for federal diversity jurisdiction otherwise established by the legislation), it may be removed to a federal court, which is authorized to exercise jurisdiction over the action. Under the proviso, however, it is the Committee's intent that any

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(referring CAFA to the floor); 151 Cong. Rec. H723-01, H736 (statement of Rep. Watt) (noting that the bill had not been referred to the House Judiciary Committee); 151 Cong. Rec. H643-01, H647 (statement of Rep. Jackson-Lee) (same). As such, there is no accompanying House committee report.

50. In interpreting CAFA, courts have taken pains to discuss the fact that S. Rep. 109-14 is dated February 28, 2005, ten days after CAFA was signed into law. *See, e.g., Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("[T]he Senate report was issued ten days after the enactment of the CAFA statute, which suggests that its probative value for divining legislative intent is minimal."). While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill. 151 Cong. Rec. S978-01, S978.

> claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) (currently $75,000), would be remanded to state court. Subsequent remands of individual claims not meeting the section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement. However, so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdictional over the action.

S. Rep. No. 109-14, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44.

This view of § 1332(d)(11) is directly in line with the conclusions we reached in employing intrinsic interpretational aids: at least four primary requirements—$5,000,000 aggregate amount in controversy, minimal diversity, numerosity, and commonality—serve as threshold requirements for a district court to have subject matter jurisdiction over the *action* as a whole. Because we hold in part VI, *infra*, that the defendants have not established the $5,000,000 aggregate amount in controversy, we need not decide today whether the $75,000 provision might yet create an additional threshold requirement that the party bearing the burden of establishing the court's

jurisdiction must establish at the outset, i.e., that the claims of at least one of the plaintiffs exceed $75,000.[51] *See* 28 U.S.C. § 1332(d)(11)(B)(i). We need only decide what the $75,000 provision *does not* do—namely, supplant the Act's plainly expressed $5,000,000 aggregate requirement by requiring a per-plaintiff minimum threshold requirement that ultimately requires a showing of claims worth $7,500,000 in the aggregate.

We conclude, therefore, that even were we to find the statutory language at issue ambiguous—and intrinsic canons of statutory construction failed to solve that

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51. The Ninth Circuit—while explicitly declining to interpret the remaining mass action provisions—held that, the $75,000 provision, required, at a minimum, a showing that one plaintiff's claims exceed $75,000. *Abrego Abrego*, 443 F.3d at 689 ("[W]e do conclude . . . that the case cannot go forward unless there is *at least* one plaintiff whose claims can remain in federal court.").

On a related point, citing *Exxon Mobil*, 545 U.S. at 558, 125 S. Ct. at 2620, the defendants seize upon the plaintiffs' concession that at least some of the individual plaintiffs have claims that exceed $75,000 to argue that, provided the action as a whole satisfies the undisputed requirements for treatment as a mass action, the district court can assert supplemental jurisdiction over the remaining plaintiffs' claims under 28 U.S.C. § 1367. This argument is unavailing. Section 1367 does not apply where "expressly provided otherwise by Federal statute[.]" 28 U.S.C. § 1367(a). Regardless of whether the final clause of § 1332(d)(11)(B)(i) serves as a threshold requirement for federal diversity jurisdiction or an exception to that jurisdiction, it is clearly, by its own terms, the very sort of explicit statutory exception from supplemental jurisdiction that § 1367(a) contemplates.

ambiguity—by looking to the legislative history of the Act, our conclusion would remain unchanged.

IV.

Identifying CAFA's threshold requirements for subject matter jurisdiction over a mass action does not bring our task to an end. Several questions remain unanswered: which party bears the burden of establishing jurisdiction, what is that party's burden of proof, and what may a district court look to in deciding whether that burden has been met. Now, we turn to the first two of these inquiries.

A.

Consistent with the limited nature of federal jurisdiction, the party seeking a federal venue must establish the venue's jurisdictional requirements. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Under this traditional rule, the defendants, having removed the case to the district court, would bear the burden of establishing the court's jurisdiction. The defendants contend, however, that this traditional rule frustrates CAFA's motivating congressional purpose of expanded access to the federal courts.[52] The defendants are not

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52. Section 2(b) of CAFA indicates that one of its purposes is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b), 119 Stat. at 5.

alone in this contention. Since its passage, courts have struggled with the question of whether CAFA shifts the burden of establishing jurisdiction in the removal context to the removed plaintiffs.

The uncertainty surrounding the burden of proof in CAFA cases arises not from the text of CAFA itself—which is silent on the matter—but from a few discrete excerpts of the statute's legislative history. The most cited passage, taken from the Senate Committee Report, states: "If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident." S. Rep. No. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40.[53]

Although several district courts have followed this apparent congressional intent in shifting the burden of proof onto the plaintiff,[54] the courts of appeals have been

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53. During floor debate, a House sponsor expressed a similar intent with regard to the assignment of the burden: "If a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper." 151 Cong. Rec. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner).

54. *See, e.g., Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289, 295 (D. Me. 2005) (citing legislative history to support shifting the burden of proof onto the party opposing removal); *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 168 (D. Mass. 2005) ("Under the Act, the burden of [proof] is on the party opposing

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reluctant to make the shift from such a "longstanding, near-canonical rule." *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006); *see Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (recognizing the "long-standing judicial rules placing the burden on the defendant" to establish jurisdiction in removal cases); *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006) ("Under CAFA, the party seeking to remove the case to federal court bears the burden to establish that the amount in controversy requirement is satisfied."); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) ("The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute with the President's signature (or by a two-thirds majority to override a veto)."). We have recently joined the Second, Third, Seventh, and Ninth Circuits in following the settled practice of placing the burden of proof on the removing defendant. *See Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006) (citing decisions of the Seventh and Ninth Circuits in maintaining that the removing party bears

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removal to prove that remand is appropriate."); *Berry v. Am. Express Publ'g, Corp.*, 381 F. Supp. 2d 1118, 1122 (C.D. Cal. 2005) ("Although the burden of proof is not addressed in either the text of the original or the text of the new statute, the CAFA was clearly enacted with the purpose of expanding federal jurisdiction over class actions . . . . To this end, the [Senate] Committee Report expresses a clear intention to place the burden of removal on the party opposing removal to demonstrate that an interstate class action should be remanded to state court."), *abrogated by Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006).

the jurisdictional burden of proof); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction.").

B.

Having established that CAFA does not shift the burden of proof in removal actions,[55] we must still clarify what that burden is. For our purposes, therefore, we must identify the standard by which we measure the sufficiency of the defendants' showing that the plaintiffs' claims exceed $5,000,000 in aggregate.

We have held that, in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (adopting the "preponderance of the evidence" standard

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55. We note in passing that the law of this circuit shifts the burden of proving the applicability of exceptions to CAFA's removal jurisdiction to the plaintiff seeking a remand. *See Evans*, 449 F.3d at 1164 (shifting the burden of proof onto the plaintiff where the plaintiff sought "to avail itself of an express statutory exception [i.e., the local controversy exception] to federal jurisdiction granted under CAFA"). The defendants urge us to read *Evans* as shifting the burden onto the plaintiffs to prove which, if any, of the plaintiffs do not have claims exceeding the $75,000 amount in controversy included in 28 U.S.C. § 1332(d)(11)(B)(i). Although we find the argument quite compelling, we decline to address it here.

after examining the various burdens of proof in different factual contexts), *overruled on other grounds, Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *see also Abrego Abrego*, 443 F.3d at 683 ("Where the complaint does not specify the amount of damages sought, the removing defendant must prove by a preponderance of the evidence that the amount in controversy requirement has been met."). Specifically, the removing defendant must establish the amount in controversy by "[t]he greater weight of the evidence, . . . [a] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* 1220 (8th ed. 2004).

We must acknowledge the peculiar implications of applying the preponderance of the evidence standard—a standard usually used to weigh competing pieces of evidence—to a situation, as here, where the court has only naked pleadings to consider.[56] *See, e.g., Samuel-*

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56. As we note in part V *infra*, the district court (and this court on review) is generally limited to considering the removing documents in deciding the propriety of removal. There is a wide range of factual contexts, however, in which an evidentiary standard may seem appropriate. If, for example, upon removal, the defendant presents the court with scores of documents received through state court discovery tending to show the jurisdictional amount in controversy requirement is satisfied, and the plaintiff counters, upon motion to remand, with a store of its own documents tending to negate such an amount, the court may be called upon to weigh such evidence.

Bassett v. KIA Motors Am., Inc., 357 F.3d 392, 398 (3d Cir. 2004) (dictum) (noting that the preponderance of the evidence standard is appropriate for resolving disputes over factual matters). There is a unique tension in applying a fact-weighing standard to a fact-free context.[57] This tension compels us to take a closer look at how this precedent emerged in our circuit.

We first specifically adopted the preponderance of the evidence standard as the burden of proof in removed cases with unspecified damages in *Tapscott v. MS Dealer Service Corp.* 77 F.3d at 1357. In adopting this standard, *Tapscott* relied on the Sixth Circuit's decision in *Gafford v. Gen. Elec. Co.*, 997 F.2d 150 (6th Cir. 1993), which, in turn, cited *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753 (E.D. Mich. 1990), which relied on the Supreme Court's opinion in *McNutt v. Gen. Motors Acceptance*

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57. Perhaps as a gesture toward this odd result, several similar cases in other circuits either expressly conflate the preponderance of the evidence standard with a "more likely than not" assessment, or skirt the former language altogether. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996) ("Under this [preponderance of the evidence] burden, the defendant must provide evidence that it is 'more likely than not' that the amount in controversy exceeds [the minimum jurisdictional amount.]"); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993) ("We conclude that the 'preponderance of the evidence' ('more likely than not') test is the best alternative."); *see also Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000) (applying a "more likely than not" standard, without mention of "preponderance of the evidence," where a plaintiff alleged an amount in controversy below the federal jurisdictional amount).

Corp. Of Ind., Inc., 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). Other circuits' use of the preponderance standard in this context can similarly be traced to *McNutt. See, e.g., Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992). The reliance on *McNutt* for this standard is premised on language in that opinion suggesting that the party bearing the burden of proving jurisdiction may be required to do so by the preponderance of the evidence. *McNutt*, 298 U.S. at 189, 56 S. Ct. at 785 ("[T]he court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.").

The application of the *McNutt-Garza-Tapscott* line to the present case is problematic. There is reason to question these courts' reliance on language in *McNutt* suggesting the preponderance standard, as *McNutt* is distinguishable both from the cases leading up to and including *Tapscott* and from the present action. The action in *McNutt* did not arise from the removal context, but was brought originally in federal court. *Id.* at 179, 56 S. Ct. at 780-81. The relevant language in *McNutt* regarding the preponderance standard, moreover, is dicta. The *McNutt* Court did not apply a preponderance standard.[58] Additionally, the *McNutt* Court's discussion

58. The Court noted that the case before it was not one requiring the weighing of conflicting evidence; rather, the case involved a conclusory allegation of the amount in controversy in the complaint and no evidence in the record relevant to the

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of the burden of proof noted that a more limited inquiry is appropriate in a case in which a court has only the bare pleadings to consider. The Court stated that "[t]he prerequisites to the exercise of jurisdiction . . . must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *Id.* at 189, 56 S. Ct. at 785. Lastly, we cannot account for the sixty-year gap between the *McNutt* decision and the initial adoption of its preponderance language in the present context in 1990 by the Eastern District of Michigan in *Garza*, 752 F. Supp. at 763.

Even assuming that *Tapscott* and similar decisions were correct in relying on *McNutt*, one might question the application of a preponderance of the evidence standard in a removal case—like this one—where there is no *evidence* to review. In each decision adopting the preponderance standard in the removal context, the court had before it evidence beyond the pleadings on which to base a decision about the amount in controversy. *See Tapscott*, 77 F.3d at 1357 n.10 ("At oral argument, attorney for Appellants conceded that if considered in the aggregate, punitive damages would exceed [the jurisdictional amount]."); *Gafford*, 997 F.2d at 160-61

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jurisdictional inquiry. *McNutt*, 298 U.S. at 181, 56 S. Ct. at 781. As such, the Court was not conducting the type of proof-based analysis that the preponderance standard may entail. *Id.* at 189-90, 56 S. Ct. at 785.

(noting that the defendant's employee testified during a pretrial hearing on jurisdiction that the plaintiff's claims for back pay would satisfy the amount in controversy requirement); *Garza*, 752 F. Supp. at 763-64 (determining that additional evidence submitted by the defendant in support of its motion for reconsideration indicated that it was "more likely than not" that the amount in controversy was satisfied). We have no such evidence before us here.

Despite these distinctions, the preponderance standard has been adopted by this circuit in the naked pleading context. *See Friedman v. N.Y. Life Ins. Co.*, 410 F.3d 1350, 1352-53 (11th Cir. 2005); *Kirkland v. Midland Mortgage Co.*, 243 F.3d 1277, 1281 n.5 (11th Cir. 2001). We are bound to adhere to circuit precedent. Defendants must establish the jurisdictional amount by a preponderance of the evidence. We note, however, that in situations like the present one—where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to apply the preponderance burden meaningfully. We have no evidence before us by which to make any informed assessment of the amount in controversy. All we have are the representations relating to jurisdiction in the notice of removal and the allegations of the plaintiffs' third amended complaint. As such, any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon. *See Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) (noting, in a removed class action, that "it was not open for defendants to

attempt to show" the requisite amount in controversy per capita where the complaint made insufficient allegations, "[n]or was it open to the district court to speculate" on whether the jurisdictional facts existed).

In part V, *infra*, we conclude that the removal-remand scheme set forth in 28 U.S.C. §§ 1446(b) and 1447(c) requires that a court review the propriety of removal on the basis of the removing documents. If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach, jurisdiction is either evident from the removing documents or remand is appropriate. Significantly, if a defendant can only carry the burden of establishing jurisdiction under these circumstances, then the defendant could have satisfied a far higher burden than preponderance of the evidence.[59] Regardless, our precedent compels us to continue forcing this square peg into a round hole.

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59. An example of such a higher standard would be "legal certainty," articulated by the Supreme Court in *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938). The *Red Cab* Court dictated that "the sum claimed by the plaintiff [bringing an action in federal court] controls if the claim is apparently made in good faith," and applied a legal certainty standard in reviewing the jurisdictional amount. *Id.* at 288-89, 58 S. Ct. at 590 ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.").

V.

We pause to take stock of what we have determined thus far. With its notice of removal, Alabama Power removed this action as a whole, including the plaintiffs' claims against both the pre-CAFA defendants and Filler Products. Because CAFA does not disturb the long-established rule that a removing defendant bears the burden of proving federal jurisdiction, upon the plaintiffs' motion to remand in this case, the defendants bear the burden of establishing the jurisdictional requirements for a CAFA mass action. Furthermore, because this case involves a complaint for unspecified damages, the defendants must establish jurisdiction by a preponderance of the evidence. We turn now to two related questions: (1) on what evidence may a removing defendant rely in asserting jurisdiction?; and (2) if that evidence is found wanting, may discovery be invoked to supplement that evidence?

A.

Our first question involves the scope of evidence on which a removing defendant may rely to establish jurisdiction. Because this inquiry depends upon how and when a defendant may remove a case to federal court, we discuss, at the outset, the relevant removal statutes. CAFA's removal provision, 28 U.S.C. § 1453(b), expressly adopts the procedures of the general removal statute,

28 U.S.C. § 1446, to govern the removal of mass actions.[60] As a threshold matter, § 1446(a) answers the question of

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60. Section 1446 provides, in relevant part:

> (a) A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable[.]

28 U.S.C. § 1446.

how removal is accomplished, stating that a defendant may remove any "civil action" by filing a notice of removal, signed pursuant to the good faith requirements of Rule 11, which contains "a short and plain statement of the grounds for removal."[61] 28 U.S.C. § 1446(a). Section

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61. Rule 11 provides, in relevant part:

> (a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension,

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1446(b) then answers the question of *when* an action is removable, setting forth the preconditions for removal in two types of cases: (1) those removable on the basis of an initial pleading; and (2) those that later become removable on the basis of "a copy of an amended pleading, motion, order or other paper."[62] § 1446(b).

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> modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Fed. R. Civ. P. 11.

62. In the second category of cases, the statute requires that jurisdiction be established by "an amended pleading, motion, order, or other paper." § 1446(b). The first three items on this

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Regardless of the type of case, a defendant must remove within thirty days of receiving the document that provides the basis for removal. § 1446(b).

Thus, under § 1446(b), in assessing the propriety of removal, the court considers the document received by the defendant from the plaintiff—be it the initial complaint or a later received paper—and determines whether that document and the notice of removal unambiguously establish federal jurisdiction.[63] This

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list are self-explanatory. What constitutes "other paper," however, has been developed judicially. Courts have not articulated a single test for identifying "other paper," but numerous types of documents have been held to qualify. They include: responses to request for admissions, *Wilson v. Gen. Motors Corp.*, 888 F.2d 779, 780 (11th Cir. 1989); settlement offers, *Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 761-62 (5th Cir. 2000); interrogatory responses, *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998); deposition testimony, *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996); demand letters, *Williams v. Safeco Ins. Co.*, 74 F. Supp. 2d 925, 929 (W.D. Mo. 1999); and email estimating damages, *Callahan v. Countrywide Home Loans, Inc.*, No. 3:06-105, 2006 WL 1776747, at *3-*4 (N.D. Fla. June 26, 2006).

63. Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) "an amended pleading, motion, order or other paper," which (2) the defendant must have received from the plaintiff (or from the court, if the
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document is an order), and from which (3) the defendant can "first ascertain" that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. *See Bosky v. Kroger Texas, LP,* 288 F.3d 208, 211 (5th Cir. 2002) (holding that grounds must be "unequivocally clear and certain"); *Huffman v. Saul Holdings, LP,* 194 F.3d 1072, 1078 (10th Cir. 1999) (same).

As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith. We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice—without seriously testing the limits of compliance with Rule 11. Unlike the typical plaintiff who originally brings a diversity action in federal court, the removing defendant generally will have no direct knowledge of the value of the plaintiff's claims. *See St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 288, 290, 58 S. Ct. 586, 590-91, 82 L. Ed. 845 (1938) (observing that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and that "[the plaintiff] knows or should know whether his claim is within the statutory requirement as to amount").

To the extent the defendant does obtain knowledge of the claims' value, it will generally come from the plaintiff herself in the form of information in an "other paper." *See* § 1446(b). This is so because a plaintiff who has chosen to file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount
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inquiry is at the heart of a case, such as the one before us, in which the plaintiffs challenge removal by filing a timely motion to remand under § 1447(c).[64] In assessing

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to the damages sought in her complaint. In such a case, like the case before us, the defendant would need an "other paper" to provide the grounds for removal under the second paragraph of § 1446(b). In the absence of such a document, the defendant's appraisal of the amount in controversy may be purely speculative and will ordinarily not provide grounds for his counsel to sign a notice of removal in good faith.

64. Section 1447(c) provides, in relevant part: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." § 1447(c).

We note that § 1447(c) distinguishes between motions to remand made within the first thirty days following removal, and challenges to subject matter jurisdiction brought after that time. Plaintiffs have only thirty days from the notice of removal to file a motion to remand challenging any procedural defects in the removal. § 1447(c); *see Wilson*, 888 F.2d at 781 n. 1 (11th Cir. 1989) (citing *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S. Ct. 1344, 1347, 31 L. Ed. 2d 612 (1972)). The existence of subject matter jurisdiction, on the other hand, may be challenged at any time, including within the first thirty days after the notice of removal. § 1447(c); *see Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."). (Cont'd)

whether removal was proper in such a case, the district court has before it only the limited universe of evidence available when the motion to remand is filed[65]—i.e., the

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There is only a thirty-day window, therefore, for a plaintiff to challenge the propriety of the *removal* itself, whether that challenge be on the basis of a procedural defect or a lack of subject matter jurisdiction. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), *overruled on other grounds, Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). Where the plaintiff does not challenge the removal on jurisdictional grounds until after judgment, or where the plaintiff challenges removal before judgment but after the thirty-day period has lapsed, the court is no longer considering the propriety of the removal, but instead, whether *subject matter jurisdiction* exists at all. *See Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S. Ct. 1344, 1347, 31 L. Ed. 2d 612 (1972) ("Longstanding decisions of this Court make clear ... that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court."). In considering these later challenges to jurisdiction, the court may look to any relevant information the parties may present, up until the time of the challenge to jurisdiction. *See id.*

65. We note that our reading of §§ 1446(b) and 1447(c) does not conflict with our recent decision in *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006). In *Miedema*, the application of § 1446(b) was not before the court. The district court in *Miedema* had considered evidence that would likely fall outside the constraints of § 1446(b), but we concluded that, even if all the evidence the district court looked to could properly be

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notice of removal and accompanying documents.[66] If that

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considered, the defendants had failed to carry their burden. *Id.* at 1330-32. Because the evidence was insufficient to establish jurisdiction, we never examined § 1446(b) or the propriety of the court's consideration of this evidence.

66. In noting that the district court is limited to considering the removing documents, we do not mean to suggest that the court does not have discretion to hold a hearing on the motion to remand and allow the parties to be heard. Such a hearing would ordinarily be limited to arguments on the sufficiency of the removing documents, however.

Moreover, there are some exceptions to the rule that the court is limited to considering the removing documents. A defendant would be free to introduce evidence regarding damages arising from a source such as a contract provision whether or not the defendant received the contract from the plaintiff. In such situations, the underlying substantive law provides a rule that allows the court to determine the amount of damages. For example, in contract law, the default measure of damages is expectation damages; a court may look to the contract and determine what those damages would be. By contrast, "[w]here the law gives no rule, the demand of the plaintiff must furnish one." *McNutt*, 298 U.S. at 182, 56 S. Ct. at 782. When a plaintiff seeks unliquidated damages and does not make a specific demand, therefore, the factual information establishing the jurisdictional amount must come from the plaintiff.

Additionally, in some limited circumstances, a defendant may effectively amend a defective notice of removal upon receipt of additional evidence that supplements the earlier-filed notice. For example, such a situation might arise where, after filing an

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evidence is insufficient to establish that removal was proper or that jurisdiction was present, neither the defendants nor the court may speculate in an attempt to make up for the notice's failings.[67] *See Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) (holding that, where a complaint did not specify the number of plaintiffs in a class action, it was not open to the defendants or the court to speculate that the class was small enough to establish the minimum amount in controversy). The absence of factual allegations pertinent to the existence of jurisdiction is dispositive and, in such absence, the existence of jurisdiction should not be divined by looking to the stars.

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insufficient notice of removal but before remand is ordered, the defendant receives a paper from the plaintiff that would itself provide sufficient grounds for removal. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839-40 n.1 (9th Cir. 2002) (holding that the defendant effectively amended its insufficient notice of removal by later alleging, in its opposition to remand, that the plaintiff had offered settlement for an amount greater than the jurisdictional minimum) (citing *Willingham v. Morgan*, 395 U.S. 402, 407 n.3, 89 S. Ct. 1813, 1816, 23 L. Ed. 2d 396 (1969)).

67. Allowing such speculation in the notice of removal with regard to the existence of jurisdiction would inevitably erode the "reasonable inquiry" standard of Rule 11 generally. If the court asserts jurisdiction on the basis of the defendant's speculative assertions, it implicitly accepts rank speculation as reasonable inquiry. This could undermine the requirement of reasonable inquiry not only in removal situations, but also in other contexts.

B.

We next consider whether a district court faced with insufficient evidence to establish jurisdiction, may, in assessing the propriety of removal, invoke discovery to supplement that evidence. The defendants[68] argue that, if we hold that they have failed to carry the burden of establishing jurisdiction, we should remand the case to the district court with instructions to grant Alabama Power's motion for leave to serve limited discovery.[69]

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68. The pre-CAFA defendants raised this discovery issue in their brief. Although Alabama Power did not address the issue in its own brief, its earlier motion for leave to serve limited discovery in the form of requests for admissions indicates that all the defendants seek discovery on the question of jurisdiction. Were we to remand to the district court with instructions to allow discovery, the defendants could conceivably obtain information relevant to jurisdiction from admissions, answers to interrogatories, or depositions.

69. In arguing that they are entitled to supplemental discovery, the defendants rely on *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316 (11th Cir. 2001). In *Williams*, a case involving unspecified damages, we held that a removing defendant "should be afforded an opportunity to submit evidence in support of [jurisdiction]," and we remanded to the district court for further factual findings. *Id.* at 1321. The defendants urge us to read *Williams* broadly to apply in the case before us. We decline to do so.

The circumstances and posture of *Williams* are distinct from the present action. The plaintiff in *Williams* did not contest the district court's jurisdiction over the action—the issue was raised

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When Alabama Power filed its motion for discovery, the court reserved ruling, instead ordering the plaintiffs' counsel to make admissions about the value of each plaintiff's claims—in effect, conducting discovery on the court's own initiative.[70] Because there is no practical distinction between these two types of "discovery"—the discovery sought by the defendants and the admissions ordered by the court—we address them jointly in our discussion below.

Post-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rules of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them.[71]

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sua sponte by this court on the plaintiff's appeal from summary judgment. 269 F.3d at 1318. The *Williams* court explicitly limited the scope of its holding, noting that remand for further factual findings was necessary "where the notice of removal asserts the jurisdictional amount and the plaintiff does *not* challenge that assertion in the district court[.]" *Id.* at 1321 (emphasis added).

70. The court instructed the plaintiffs' counsel to file with the court the names of any plaintiffs whose claims were likely to exceed $75,000. This instruction amounted to a request for admissions from the plaintiffs regarding their individual amounts in controversy.

71. Our holding here is limited to diversity cases. Because federal question jurisdiction is to some extent intertwined with the existence of a valid federal claim on the merits, it has long been established that federal question cases require a stricter
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Certainly, the power to grant discovery generally is conferred to the sound discretion of the district court, and post-removal jurisdictional discovery may appear to present a viable option for a court examining its jurisdiction. Jurisdictional discovery could avoid the problem of speculation by the court. Sound policy and notions of judicial economy and fairness, however, dictate that we not follow this course.

To illustrate, we begin with the paradigmatic case of a plaintiff filing an original diversity action in federal court. As discussed in part IV, *supra*, the party who invokes the jurisdiction of the court has the burden of establishing jurisdiction. Rule 8(a) requires the plaintiff to set forth in the complaint the factual support for jurisdiction.[72] Fed. R. Civ. P. 8(a). The plaintiff's factual

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standard for dismissal on jurisdictional grounds. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 733-34 (11th Cir. 1982). Consequently, in such cases, "a plaintiff must have ample opportunity to present evidence bearing on the existence of jurisdiction." *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991). Nevertheless, as the former Fifth Circuit noted, "a jurisdictional attack which does not implicate the merits of any federal cause of action is not bound by the strict *Bell v. Hood* standard. A district court may find, for example, that the basis for diversity jurisdiction is absent without finding that the underlying state claim is 'immaterial' or 'insubstantial.'" *Williamson v. Tucker*, 645 F.2d 404, 416 n.9 (5th Cir. May 1981).

72. Rule 8(a) states in relevant part that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends [.]" Fed. R. Civ. P. 8(a).

allegations are subject to Rule 11's command—under pain of sanctions—that the "allegations and other factual contentions have, [or are likely to have following discovery,] evidentiary support[.]" Fed. R. Civ. P. 11(b). By filing the action in federal court, the plaintiff is making a representation that the action belongs before the court. *Red Cab,* 303 U.S. at 288, 290, 58 S. Ct. at 590-91. Because counsel is subject to Rule 11 sanctions, we assume that this representation is made in good faith and that the plaintiff has factual bases for believing that the federal court has jurisdiction to hear the claims.

Despite the plaintiff's representation and our assumption of good faith, if a material element required for either the substantive claim or the court's subject matter jurisdiction is missing from the complaint, the defendant may move to dismiss. If the plaintiff 's counsel concedes that the plaintiff lacks the evidence necessary to cure the deficiency, the court may dismiss the action for failure to state a claim or want of jurisdiction. In either case, without further discovery, counsel cannot in good faith amend the complaint to provide the missing element. In our hypothetical diversity case, should the plaintiff request leave to conduct discovery to support its assertion that the case is properly before the court, the court would deny such a request. In such a situation, the court would not reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not—before coming through the courthouse doors, even though the court would have the inherent power to do so. In deciding if dismissal is proper, a court would look only to the facts

as alleged in the complaint and would not waste limited judicial resources by directing its inquiry elsewhere.

Just as a plaintiff bringing an original action is bound to assert jurisdictional bases under Rule 8(a), a removing defendant must also allege the factual bases for federal jurisdiction in its notice of removal under § 1446(a).[73] Though the defendant in a diversity case, unlike the plaintiff, may have no actual knowledge of the value of the claims, the defendant is not excused from the duty to show by fact, and not mere conclusory allegation, that federal jurisdiction exists. Indeed, the defendant, by removing the action, has represented to the court that the case belongs before it. Having made this representation, the defendant is no less subject to Rule 11 than a plaintiff who files a claim originally.[74] Thus, a

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73. Section 1446(a)'s requirement of "a short and plain statement of the grounds for removal" is consonant with the pleading requirements of Rule 8(a).

74. The legislative history for § 1446 is limited, but it does indicate that Congress intended § 1446 to be read alongside the good faith requirements of Rule 11 and Rule 8(a) pleading requirements. The House Report of the Judiciary Committee clarified the 1988 amendments to § 1446(b):

> The sanctions available under Civil Rule 11 apply to every "other paper", but it seems desirable to make it clear that they are available in cases of improvident removal. The present requirement that the petition of removal state the facts supporting removal has led some courts to require detailed pleading. Most

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defendant that files a notice of removal prior to receiving clear evidence that the action satisfies the jurisdictional requirements, and then later faces a motion to remand, is in the same position as a plaintiff in an original action

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> courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by [C]ivil [R]ule 8(a).

H.R. Rep. 100-889 (Aug. 26, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032. There was no Senate Report for § 1446.

Section 1446's invocation of Rule 11 further supports our decision with regard to the assignment of the burden of proof in part IV, *supra*. As we have noted, some district courts rely on CAFA's legislative history in shifting to the plaintiff the jurisdictional burden of proof. Such an assignment of the jurisdictional burden oddly divorces the burden from the defendant, who, under § 1446—and, by incorporation, Rule 11—must make good faith averments that jurisdiction exists. Assigning the burden to the plaintiff is the equivalent of giving the removing defendant a presumption that jurisdiction exists. If the plaintiff attempts to prove the non-existence of jurisdiction by averring that the claims are worth less than the required jurisdictional amount, the plaintiff may be estopped in state court from arguing that the claims exceed that amount. In such situations, the plaintiff's counsel could not contest the jurisdictional amount without working to the client's detriment. Yet, in the absence of any statement from the plaintiff, the defendant's assertion of the jurisdictional amount would be unchallenged. Thus, the plaintiff would effectively be forced to concede to the removal. Had Congress intended that CAFA so disrupt the policy behind § 1446, it would not have incorporated that statute directly into CAFA.

facing a motion to dismiss. The court should not reserve ruling on a motion to remand in order to allow the defendant to discover the potential factual basis of jurisdiction. Such fishing expeditions would clog the federal judicial machinery, frustrating the limited nature of federal jurisdiction by encouraging defendants to remove, at best, prematurely, and at worst, in cases in which they will never be able to establish jurisdiction.

Here, Alabama Power is a removing defendant that has asserted no factual basis to support federal jurisdiction and now faces a motion to remand. As in the scenario above, the defendants here asked that the district court reserve ruling on the motion to remand so that they could conduct discovery to obtain information from the plaintiffs that would establish that the court has jurisdiction. The defendants' request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court.

Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. A district court should not insert itself into the fray by granting leave for the defendant to conduct discovery or by engaging in its own discovery.[75] Doing so impermissibly lightens the

75. This is not to say that the district court would be precluded from engaging in conduct that is within its inherent power, but falls short of invoking formal discovery, such as questioning a plaintiff's counsel in open court about the value of the plaintiff's claims.

defendant's burden of establishing jurisdiction. A court should not participate in a one-sided subversion of the rules. The proper course is remand.[76]

VI.

We turn now to the merits of this case. In the present dispute, the defendants sought immediate review of the district court's remand order under CAFA. 28 U.S.C. § 1453(c). Because jurisdiction was challenged within thirty days of removal, and remand was promptly granted, we are limited in our review to determining whether the pleadings or "other paper" included with the notice of removal provide an unambiguous statement that clearly establishes federal jurisdiction over this action.

As an initial matter, the district court's consideration of the mass action jurisdictional requirements was

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76. Even if there were no Rule 11 and 8(a) policy concerns, we would still doubt the propriety of discovery in this context. Discovery is a matter of discretion for the court. The court's denial, grant, or limitation of a motion for discovery is reviewed for abuse of discretion. *See Moorman v. UnumProvident Corp.*, 464 F.3d 1260, 1264 (11th Cir. 2006). A trial court, therefore, would indirectly control the outcome of the motion to remand by exercising or refusing to exercise its discretion. If a court refused to exercise its discretion to allow jurisdictional discovery, the case would be remanded. But we review the decision not to allow discovery—a decision which would effectively decide that the action would be remanded—for abuse of discretion. Motions to remand should be decided on the merits as a matter of law, not incidentally as a result of the discretion of a court.

limited to the claims against Alabama Power, because the court concluded that the notice of removal brought before it only the claims against Alabama Power. We held in part II, *supra*, that Alabama Power's notice of removal removed all of the plaintiffs' claims; therefore, we consider the question of whether the jurisdictional thresholds are met in light of the action as a whole, including all defendants.

As we noted in part I, *supra*, Alabama Power's initial notice of removal included only conclusory allegations that each of CAFA's mass action provisions was satisfied. Alabama Power attached two documents to the notice of removal: the third amended complaint and plaintiffs' initial complaint. The plaintiffs' motion to remand this case presented two arguments against the district court's jurisdiction: (1) that this lawsuit fails to meet CAFA's mass action jurisdictional requirements; and (2) that even if those jurisdictional requirements are met, jurisdiction is nonetheless inappropriate because the case falls under CAFA's "local controversy" exception of 28 U.S.C. § 1332(d)(4).[77] Because we hold that this action—as depicted in plaintiffs' third amended complaint—fails to satisfy CAFA's jurisdictional requirements for a mass action—specifically, that defendants have failed to carry their burden in establishing that plaintiffs' claims are potentially valued

77. We set forth the text of this exception in note 37, *supra*.

at $5,000,000 or more[78]—we need not reach plaintiffs' second contention.

Under § 1446(b), we look to the face of the notice of removal and any attached documents to determine if we have jurisdiction. Here, we first consider the third amended complaint, which Alabama Power attached to its notice of removal. That complaint contains neither an *ad damnum* clause indicating the amount of damages sought, nor any other concrete information about the value of plaintiffs claims. As such, we find no unambiguous statement on the face of the amended complaint that would be sufficient to establish that plaintiffs' claims potentially exceed $5,000,000 in aggregate.

In addition to the operative third amended complaint, Alabama Power attached to its notice of removal a copy of plaintiffs' initial complaint in this case. That complaint included an *ad damnum* clause seeking $1,250,000 in damages for each of the nine initial

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78. It is manifest from the face of the plaintiffs' amended complaint—and the plaintiffs do not dispute—that this action satisfies CAFA's numerosity, commonality, and minimal diversity requirements. The plaintiffs conceded in open court that at least one of the individual plaintiff's claims exceeded $75,000. Such a concession may effectively amend Alabama Power's notice of removal, *see Willingham v. Morgan*, 395 U.S. 402, 407 n.3, 89 S. Ct. 1813, 1816, 23 L. Ed. 2d 396 (1969), and support Alabama Power's conclusory allegation on the subject. Because we hold that defendants fail to establish the aggregate amount in controversy, we do not reach this issue.

plaintiffs from the twelve initial defendants. The defendants contend that the initial complaint is sufficient to establish that the plaintiffs are seeking in excess of $5,000,000 in aggregate. We disagree.

We note that Alabama Power could have relied, in the absence of the third amended complaint, on the initial complaint as a jurisdiction-communicating document under § 1446(b). While the initial complaint was filed more than thirty days prior to Alabama Power's July 17, 2006 removal, Alabama Power was not added to this action until June 20, 2006—less than thirty days prior to removal. Alabama Power would have first been aware of this initial complaint, therefore, when it was made privy to the record as a whole. This occurred upon Alabama Power's addition as a defendant less than thirty days prior to removal.[79]

That Alabama Power did not actually receive the initial complaint directly from the plaintiffs does not bar

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79. The thirty-day window would likewise not have barred Alabama Power from relying on evidence gleaned from the discovery conducted by the pre-CAFA defendants during the more than three years between the filing of the initial complaint and Alabama Power's notice of removal. Any such evidence would have been in Alabama Power's possession for less than thirty days. Because the removing papers make no mention of the state court discovery, the state court record did not include any discovery, and a complete record of the discovery was not provided to this court, we can only conclude that defendants do not rely on any discovered evidence as "other paper" under § 1446(b) in arguing for jurisdiction.

Alabama Power's reliance on the document under § 1446(b). The initial complaint was drafted and filed by the plaintiffs and became a matter of record in this action. Alabama Power, therefore, constructively received this complaint from the plaintiffs when it became privy to that record.

That said, however, it would be improper to bind plaintiffs by the prayer for relief in the initial pleading. Plaintiffs have since amended the prayer for relief, and this amended prayer for relief supersedes the one contained in the initial complaint. Under both Alabama and federal law, an amended complaint supersedes the initial complaint and becomes the operative pleading in the case. *See Fritz v. Standard Sec. Life Ins. Co. of New York*, 676 F.2d 1356, 1358 (11th Cir. 1982); *Ex parte Puccio*, 923 So.2d 1069, 1072-73 (Ala. 2005). Moreover, the jurisdictional allegations in both complaints were subject to the requirements of Alabama Rule of Civil Procedure 11.[80] We accordingly presume that the

80. Ala. R. Civ. P 11 states, in relevant part:

> Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . . The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

Ala. R. Civ. P. 11. Alabama Rule 11 tracks the original text of Fed. R. Civ. P. 11 at its adoption in 1938.

plaintiffs' original demand of $1,250,000 reflected counsels' good faith assessment of the full value of their claims at the time. We likewise must presume, however, that the plaintiffs' amended, unspecified demand clause also reflects counsels' revised good-faith determination regarding damages. The third amended complaint represents counsels' belief that counsel could, in good faith, state only that the plaintiffs' claims put in controversy an amount greater than the Alabama Circuit Courts' jurisdictional minimum of $3,000. In short, we do not bind parties to a figure counsel cannot advance in good faith. The plaintiffs amended their complaint to remove the specific damages demand, and that amended pleading is the document we look to in determining whether jurisdiction exists.

Following the plaintiffs' motion to remand, Alabama Power supplemented its notice of removal. Alabama Power's supplement advanced three arguments to support federal jurisdiction over this action. We have just disposed of one of these arguments—that the initial complaint's *ad damnum* clause established the aggregate amount in controversy. In addition, Alabama Power contended that the amount in controversy could be derived from the number of plaintiffs and the nature of the claims asserted. Finally, the supplement also provided the district court with evidence regarding the value of purportedly similar tort claims in Alabama and argued that this evidence was sufficient to establish the aggregate amount in contro ersy. Neither argument is sufficient to establish jurisdiction.

The supplement contended—and the defendants argue on appeal—that the nature of the claims the plaintiffs have asserted supports a conclusion that those claims exceed the required aggregate jurisdictional amount. We do not agree. Whatever indications of value can be gleaned from the plaintiffs' pleadings are insufficient to support a conclusion that the plaintiffs' claims were potentially valued at $5,000,000 or more in the aggregate. The defendants' argument is premised on the observation that, to reach the jurisdictional threshold, each of the roughly 400 plaintiffs need only recover, on average, $12,500. It may be true, in light of the nature of the claims the plaintiffs assert—seeking, among other things, recovery for an ongoing nuisance and punitive damages—that a recovery of $12,500 per plaintiff appears to be a relatively low hurdle. Nevertheless, we fail to see how we can justify a conclusion that the per-plaintiff recovery will exceed even so low a total. To reach such a conclusion, we would necessarily need to engage in impermissible speculation—evaluating without the benefit of any evidence the value of individual claims. The complaint alone cannot satisfy the defendants' burden in proving jurisdiction.

The additional "evidence" contained in the supplement likewise fails to support the defendants' contention that the district court had jurisdiction over this action. First, we note that this evidence regarding the value of other tort claims was not received from the plaintiffs, but rather was gathered from outside sources. As such, the evidence is not of the sort contemplated by § 1446(b). Even if the defendants had received the

evidence of other suits from the plaintiffs, we question whether such general evidence is ever of much use in establishing the value of claims in any one particular suit. Looking only to this evidence and the complaint, the facts regarding other cases tell us nothing about the value of the claims in this lawsuit. Even were we to look to evidence beyond that contained within the notice of removal, in the present dispute—with a record bereft of detail—we cannot possibly ascertain how similar the current action is to those the defendants cite. Absent specific detail about the present action, the supplement in no way clarifies the aggregate value of the claims here. The defendants, therefore, have failed to meet their burden.

VII.

A brief summary of our conclusions is warranted. First, we hold that any one defendant authorized under CAFA to remove the plaintiffs' claims against that defendant to federal court may remove the action as a whole, regardless of whether other defendants in the action would be authorized to remove their claims.

Second, we hold that CAFA sets forth at least four threshold requirements for a federal court to have subject matter jurisdiction over a removed mass action. Where the parties are minimally diverse, the action consists of 100 plaintiffs or more, the plaintiffs' claims share common questions of law or fact, and the potential aggregate value of all the claims exceeds $5,000,000, the action may be removed to federal court as a mass action.

Third, we hold that the defendants are not entitled to remand to the district court for limited jurisdictional discovery, nor may the district court conduct such discovery on its own initiative.

Moving to the merits, we hold that the defendants here are unable to meet their burden of establishing the requirements for federal jurisdiction over a mass action, because they are unable to establish that the plaintiffs' claims are potentially valued at more than $5,000,000. Tracking § 1446(b), we note that the defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds that amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence.

In sum, though our reasoning diverges substantially from that of the district court, the disposition of this case remains the same. Remanding this action to state court was the appropriate course. The district court's order is accordingly

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA DATED OCTOBER 24, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Civil Action No. 06-AR-1370-S

Katie LOWERY, et al.,

Plaintiffs,

v.

HONEYWELL INTERNATIONAL, INC., et al.,

Defendants.

Oct. 24, 2006.

MEMORANDUM OPINION

ACKER, District Judge.

Before the court is the motion of Katie Lowery and her 418 fellow plaintiffs ("plaintiffs") to remand their above-entitled conjoined action to the Circuit Court of Jefferson County, Alabama, from which it was removed by one defendant, Alabama Power Company ("Alabama Power"), as a purported "mass action" under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1453

and 1332(d). Also before the court is plaintiffs' motion for reconsideration of the court's order of August 16, 2006, requiring them to state their opinions of the fair values of their respective 419 individual claims and whether or not an aggregation of their claims can reasonably be expected to reach the $5,000,000 in controversy necessary for a CAFA removal. For the reasons that follow, the court will grant both the motion for reconsideration and the motion to remand.

I. Introduction and Procedural History

Plaintiffs own and occupy numerous parcels of real property situated in Jefferson County, Alabama. On January 24, 2003, Ms. Lowery and eight other individuals filed a complaint against eleven named alleged polluters and multitudinous fictitious defendants in the Circuit Court of Jefferson County, Alabama, Bessemer Division, seeking damages under Alabama law for trespass to person and realty; negligent, wanton or intentional injury; nuisance; and outrageous conduct. If any tort was committed by any defendant, it arose out of the discharge of pollutants into the air of Jefferson County. There is nothing in the original complaint to distinguish between a plaintiff who may be claiming severe lung disease from one who may be claiming grit in her grits. The original complaint included the following demand:

> [E]ach Plaintiff demands judgment against said Defendants in the sum of One Million Two Hundred Fifty Thousand Dollars and costs.

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On October 31, 2005, after the case had been transferred from the Bessemer Division to the Birmingham Division, plaintiffs filed an amended and recast complaint, in which 533 individuals were named as plaintiffs and an additional defendant was named, and the preposterous demand for $1,250,000 for each plaintiff was eliminated and replaced with the following enigma:

> [T]he plaintiffs demand judgment against said defendants in an amount of compensatory and punitive damages to be determined by a jury in excess of the jurisdictional minimum of this [state] Court, together with interest from the date of injury, and the costs of this proceeding.

There was no request, express or implied, for status as a class action in the original or any subsequent amended complaint. The only excuse offered for conglomerating the separate, individual complaints into one suit was that the claims shared common questions of fact and law. On March 16, 2006, plaintiffs filed a second amended and recast complaint, which named 417 plaintiffs and in which the indeterminate demand for judgment and damages was not changed.

On June 20, 2006, plaintiffs filed a third amended and recast complaint, naming 419 plaintiffs and adding as defendants, Alabama Power and Filler Products Company, Inc. ("Filler Products"). No new theories of liability or new acts of tortious conduct were added, and plaintiffs' demand for an unspecified amount in damages was identical to that contained in their first and second amended and recast complaints. On July 17, 2006,

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Alabama Power removed the case to this court. In its supplemental notice of removal it invoked 28 U.S.C. § 1446 and the removal provisions of CAFA, 28 U.S.C. §§ 1453 and 1332(d), asserting that the action constitutes a "mass action", which, under 28 U.S.C. § 1332(d)(11)(B)(i), is removable. Paragraph 3 of the supplement to the notice of removal began with this sentence: "Plaintiffs did not specify their damages in the complaint". On August 3, 2006, plaintiffs filed the motion to remand now under consideration. Although plaintiffs initially withdrew their motion to remand, they thereafter asked that it be reinstated, and the court reinstated it.[1]

On August 11, 2006, defendants, Filler Products, Hanna Steel Corporation, United States Steel Corporation, Butler Manufacturing Company, Honeywell International, Inc., Fritz Enterprises, Inc., CertainTeed Corporation, Vulcan Materials Company, Baily-PVS Oxides, LLC, and W.J. Bullock Inc., purported to join Alabama Power's notice of removal, although they deny that they were required to do so. They take the position that the entire case was effectively removed by the filing of Alabama Power's notice of removal.

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1. Alabama Power objects to the court's having allowed plaintiffs to refile their motion to remand. Even if the permission given was not a matter within the court's discretion, the court's subject matter jurisdiction would necessarily be addressed *sua sponte*.

II. Was the Case Successfully Removed by All or Any of the Defendants?

A. The Significance of the Date of Commencement

CAFA expressly provides that "[t]he amendment made by this Act shall apply to any civil action **commenced** on or after the date of enactment of this act." (emphasis added). The date of CAFA's enactment was February 18, 2005. According to CAFA, then, to the extent this action was "commenced" before February 18, 2005, CAFA provided no removal opportunity.

Although plaintiffs filed their original complaint before CAFA's enactment, the amendment that added Alabama Power and Filler Products, and that precipitated this removal, came after CAFA's effective date. This procedural fact creates two potentially dispositive removability questions: (1) did the filing of the third amended complaint "commence" a new suit for purposes of CAFA; and (2) if so, did the new suit, by retroactive effect, "commence" as to **all** defendants, or only as to Alabama Power and Filler Products. Filler Products did not join the removal until more than thirty days after service of the third amended complaint, as required by 28 U.S.C. § 1446(b), and for aught appearing, it never filed a copy of a removal notice with the clerk of the state court as required by 28 U.S.C. § 1446(d). Therefore, the purported joinder by Filler Products in the removal by Alabama Power presents a timeliness issue not shared by Alabama Power or any of the original defendants.

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After the court heard oral argument on plaintiffs' motion to remand, the Eleventh Circuit followed the Fifth Circuit's decision in *Braud v. Transport Service Co. of Illinois*, 445 F.3d 801, 803 (5th Cir. 2006), and held that state law determines when an action is "commenced" for the purposes of CAFA. *Tmesys, Inc. v. Eufaula Drugs, Inc.*, 462 F.3d 1317, 1319 (11th Cir. 2006). In *Braud*, the Fifth Circuit had earlier explained that the date upon which an action is "commenced" in a state court is ascertained from that state's rules of procedure. 445 F.3d at 803. Accordingly, this court must look to the Alabama Rules of Civil Procedure to find out when this action was "commenced." Alabama's rules provide that "[a] civil action is commenced by filing a complaint with the court."Ala. R. Civ. P. 3(a). The fact, then, is that unless there is a way for defendants to escape the clutches of this procedural rule, this action was "commenced" on January 24, 2003, when the original complaint was filed.

As the *Braud* court recognized, a distinct issue appears when a complaint is amended to add a defendant. Following the Seventh Circuit's *dicta* from *Schillinger v. Union Pac. R.R.*, 425 F.3d 330 (7th Cir. 2005), the Fifth Circuit in *Braud* held that **"as to the new defendant,** removability is determined as of the date of receipt of service of the amended complaint, not as of the date on which the original suit was filed in state court." 445 F.3d at 805. (emphasis added). This language is pregnant with meaning. It means that **as to Alabama Power and Filler Products** for the purposes of CAFA this action was not "commenced" until June 20, 2006, while as to the original defendants, it was "commenced" on January 24, 2003.

There is no basis for artificially applying the concept of "retroactivity" so as to make June 20, 2006, the "commencement" date as to original defendants against whom no new claims were made in the amended complaint filed on June 20, 2006. Accordingly, only Alabama Power and Filler Products could, by filing notices of removal within thirty days after June 20, 2006, and notifying the state court clerk of the removal, avail themselves of the removal provisions of CAFA. This leaves for discussion only the question of whether the procedural and substantive requisites for a CAFA removal were met by Alabama Power and Filler Products.

All defendants strenuously argue that a CAFA removal by a single defendant added after CAFA's enactment operates to effect the removal of the entire action, including all of the parties and all of the claims, and not just the claims asserted against the defendant or defendants added after CAFA's effective date. Defendants rely on (1) the statutory language of CAFA, (2) Congressional intent, and (3) the Fifth Circuit's decision in *Braud.* The recent case of *Moniz v. Bayer A.G.*, 447 F. Supp. 2d 31 (D. Mass. 2006), was not urged upon the court, that case having only come up on the Westlaw screen after this removal, but for the reasons that follow, the court remains unpersuaded, either by defendants' arguments, or by *Moniz* and the authorities it cites.

Defendants first contend that the statutory language supports their belief that a single, post-CAFA defendant

can remove the **entire** action. In particular, defendants note that, with regard to a "class action", CAFA provides that "such **action** may be removed by any defendant without the consent of all defendants". 28 U.S.C. § 1453(b) (emphasis added). Defendants' position in this regard is not entirely devoid of merit. Under 28 U.S.C. § 1332(d)(11)(A), "a **mass action** shall be **deemed** to be a **class action** removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs". (emphasis added). Accordingly, if defendants are correct when they say that this action constitutes a "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i), Alabama Power's notice of removal arguably functions as a removal of the entire **"action"**, including **all** plaintiffs' claims against all defendants, sweeping into this court the claims against the pre-CAFA defendants who theoretically might not have wanted their case in a federal court, and the one post-CAFA defendant who, in this case, did not timely join in the removal.

Whether or not this action is, in fact and law, a "mass action" according to CAFA's definition of that term is not clear. *See Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 682 (9th Cir. 2006) (discussing the confusion around the definition of "mass action", and noting that meshing existing jurisdictional and removal statutes with CAFA "mass action" provisions is "far from straightforward"). Regardless of how this Gordian knot will ultimately be untied, the court rejects defendants' argument, because adopting it would render § 1332 internally inconsistent. In particular, § 1332(d)(11)(B)(i)

provides that "[a]s used in subsection (A), the term 'mass action' means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, **except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements** under subsection (a)." (emphasis added).[2] If defendants' position were adopted, this enormous loose conglomeration of 419 individual damage suits suddenly became removable on June 20, 2006, under § 1333(d)(11)(A), even though this court clearly lacked subject-matter jurisdiction over the claims of the individual plaintiffs whose claims are worth less than $75,000. If there is internal inconsistency in CAFA, that inconsistency must be resolved by giving predominance to the language that limits jurisdiction, and not to language that would expand it. Although defendants' argument has colorable merit, the court respectfully rejects the idea that CAFA's language mandates complete removability of this case. To the contrary, the court concludes that an "action" removable

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2. The difficulty in meshing "mass action" with "class action" is illustrated by the fact that a "class action" is not removable under CAFA unless "the matter in controversy exceeds the sum or value of $5,000,000." A "mass action" is "deemed" to be a "class action," if it has 100 plaintiffs, but, hypothetically, if 99 of the plaintiffs have claims of nominal value, their individual claims cannot be removed. Does this mean that one claim out of 100 is removable if it is worth enough to bring the aggregation of claims to the magic figure of $5,000,000, or is it necessary that at least 100 plaintiffs each have a claim worth $75,000 and an aggregate value of $5,000,000?

under § 1453(b), when used in connection with a "mass action" as defined by § 1332(d)(11), refers only to the removal of the claims of those plaintiffs over whom the federal court has subject-matter jurisdiction, namely, those that exceed $75,000 in value and that were commenced after February 18, 2005.

Not taking "no" for an answer, defendants next argue that in CAFA Congress intended to expand federal jurisdiction, and that the removal provisions as a matter of this new public policy are to be liberally construed in favor of removal. Defendants rely on the following language from a Senate Judiciary Committee Report: "[b]y this provision, it is the Committee's intent to overrule case law developed by the federal courts requiring the consent of all parties, to the extent that such precedents might be applied to class actions subject to the expanded jurisdictional removal provisions . . . ." Judiciary Committee Report on Class Action Fairness Act, S. REP. No. 109-14 (1st Sess. 2005). This argument falls short for several reasons. First, the provision to which the Committee language refers is subsection 1453(b), and not subsection 1332(d), the subsection that defines "mass action," as distinct from "class action," the latter of which this case admittedly is not. While a consideration of legislative history is appropriate in instances where there is ambiguity in the statutory language, and while the word "action", as used in subsection 1453(b), is arguably ambiguous, the portion of the Committee Report that defendants rely upon does

not resolve that possible ambiguity.[3] More importantly, the Committee language does not support the position defendants put forward. The sentence immediately preceding the one cited by defendants states that "[t]his revision to the removal rules will prevent a plaintiffs' attorney from recruiting a 'friendly' defendant . . . who could refuse to join in a removal to federal court and thereby thwart the legislative efforts of the primary corporate defendant to seek a federal forum in which to litigate the pending claims". S REP. NO. 109-14. This portion of the Committee Report is inapposite, because no party to the instant case claims that a failure to remove by any defendants other than Alabama Power precluded Alabama Power's removal. And even if the Committee Report excerpt were relevant, it was issued ten days **after** CAFA was enacted, and by a small subset of the voting body of the Senate. Such after-the-fact bolstering or "shaping" is a technique of statutory construction this court rejects. This court shares the Ninth Circuit's recognition that this belated Committee Report has limited persuasive value. *See Abrego*, 443 F.3d at 683. Furthermore, the same Senate Report was relied upon by defendants in *Moniz*, in which defendants, defending their CAFA removal, quoted the following language from the Report, at page 43: "it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court". The district court speaking in

3. Speaking of ambiguity, there is other language in CAFA that is ambiguous enough to tempt post-hoc comment by Congresspersons and Senators with agendas.

Moniz made short shrift of this argument, quoting the Southern District of Texas as follows:

> The rule that the proponent of federal jurisdiction bears the risk of non-persuasion has been around for a long time. To change such a rule, Congress must enact a statute [to that effect]. A declaration by 13 Senators will not serve.

Werner v. KPMG LLP, 415 F. Supp. 2d 688, 693 (S.D. Tex. 2006).

As their last gasp, defendants argue that the entire action is removable because *Braud*, properly construed, requires it. Despite the Fifth Circuit's clearly explaining that the action became removable only **"as to the new defendant"**, defendants point out that the Fifth Circuit did actually find the entire action there to have been properly removed. Although defendants do not misstate *Braud* in this regard, they err in asserting that "the salient facts before the Court in *Braud* were not unlike those now presented in this case." The most salient, the most distinctive, and the most material fact in this case is that it is a purported "mass action" under 28 U.S.C. § 1332(d)(11)(B)(i), and not a "class action" under 28 U.S.C. § 1332(d)(1)(B), as in *Braud*. In accordance with a limiting *proviso* within the section of the statute defining "mass action," subject-matter jurisdiction exists "only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i). There is

no such jurisdictional limitation for individual plaintiffs in **class** actions. Thus, this case presents an issue that the *Braud* court did not consider, and had no reason to consider, namely, the effect of § 1332(d)(11)(B)(i) on whether a "mass action" can be removed in its entirely by a post-CAFA defendant, just as if the action had been a "class action" under § 1332(d)(1)(B). To apply *Braud* to a purported "mass action" would result in a multi-plaintiff action being entirely removable, overriding a clear lack of jurisdiction over the claims of particular plaintiffs having claims of less than $75,000 in value.[4] Lastly, defendants forget that decisions by the Fifth Circuit are not binding on the Eleventh Circuit unless pre-1981.

Despite CAFA, federal courts are still courts of limited jurisdiction. While CAFA admittedly broadens federal removal jurisdiction, it does not unanchor the federal courts from the basic principle of federalism that requires the construction of removal statutes against a removing defendant.

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4. Moreover, under 28 U.S.C. § 1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal". Adopting defendants' position would lead to the further anomalous result that a non-removing defendant in a mass action-who nevertheless has its claims removed by another defendant under CAFA-might be required to pay attorneys fees and costs associated with an improper removal even though that defendant did not submit to or join the notice of removal.

Moniz presented to the district court in Massachusetts a question of the CAFA removability of a case involving the question of the possible "relation back" of an amendment that made a substantive change in a theory, or that added new claims for relief after the enactment of CAFA. First, *Moniz* was a "class action" and not a "mass action". No new defendant was added as in the instant case. The idea of "relation back" in a case in which a new defendant is added was not addressed in *Moniz* except as *dicta*, and is clearly not presented in the instant case. The claims against these original defendants were the same on June 20, 2006, when Alabama Power and Filler Products were added, as they were on January 24, 2003, when the complaint was first filed.

B. Do Alabama Power and Filler Products Meet the CAFA Removal Requirements?

The court having concluded that the CAFA removal provisions apply only to Alabama Power and Filler Products, and that the action against the original defendants cannot tag along, the court next examines whether the removal by the two post-CAFA parties was effective. The court knows of no reason why Filler Products is excused from compliance with 28 U.S.C. § 1446(b) and (d) which required it to remove, as Alabama Power did, within thirty days after it first received a paper alerting it to the fact of removability. However, this failure by Filler Products becomes academic in light of the conclusion this court reaches that the substantive removal requisites for post-CAFA removal were not met either by Alabama Power or by Filler Products.

To repeat for the third time, in CAFA "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i). As in diversity removals generally, the amount in controversy must "exceed the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). The original nine plaintiffs specified in their original complaint that each demanded $1,250,000 plus costs. However, nowhere in any subsequent amendment does any plaintiff claim or otherwise designate a specific amount of damages, and Alabama Power was not added as a defendant until the third amended and recast complaint was filed. Alabama Power apparently argues that, because CAFA became effective before plaintiffs filed their first amended and recast complaint—*i.e.*, when the complaint contained an express demand of more than $75,000 in damages for each plaintiff—the jurisdictional amount requirement of 28 U.S.C. § 1332(d)(11)(B)(i) has been met. Alabama Power's argument is unconvincing because the action had not "commenced" as to it when the original complaint was still in effect. The action did not so "commence" as to Alabama Power until the third amended and recast complaint was filed, and by that time plaintiffs had eliminated any specification of damages being sought. It is of no consequence that CAFA became effective when the astronomical amount in controversy was still specified in the complaint, because such amount was **not** specified when the action became even arguably removable under CAFA. During the time the original complaint was still operative, not only had the action not

yet "commenced" as to Alabama Power, but neither had the 28 U.S.C. § 1332(d)(11)(B)(i) requirement that a "mass action" must involve the monetary relief claims of at least 100 persons been met.

By the time this action could possibly have become a "mass action" removable under CAFA, the complaint in effect was silent as to the amount in controversy. And when a state court complaint is uncertain or silent on the amount being sought, the removing defendant under 28 U.S.C. § 1332 has the burden of proving the jurisdictional amount by a preponderance of the evidence. *Leonard v. Enterprise Rent A Car,* 279 F.3d 967, 972 (11th Cir. 2002). Nothing in CAFA changes this rule. A conclusory allegation in the notice of removal cannot supply the proof necessary to meet this burden. In spite of the rather unrealistically ambitious amount-in-controversy figure specified in the original complaint, the values of the claims contained in the third amended and recast complaint are highly speculative. This court, based on its experience and on the voluminous state court file, frankly doubts, despite plaintiffs' counsel's bravado on behalf of some of his unnamed clients, that any plaintiff's claim exceeds $75,000 in value, much less that all claims aggregate in excess of $5,000,000 in value, as required for a CAFA removal. It is easy to hope that 419 combined claims have an aggregate value over $5,000,000. It is something else for a removing defendant to prove it.

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1. Under CAFA, Do the Plaintiffs Bear the Burden of Establishing the Nonexistence of the Amount in Controversy?

Does the fact that none of these named 419 plaintiffs disclaim and disavow all intention or hope of recovering more than $75,000, and that they are willing to engage in wishful thinking that their total claims are worth $5,000,000, constitute proof of the existence of the CAFA jurisdictional amount? Defendants say that it does. Plaintiffs say that it does not. It comes down to which side has the burden of proof on this subject, and how, and if, that burden can be met in a "mass action" case. The Eleventh Circuit has recently gotten ahead of the district court who wrote *Moniz* by holding that **"CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction".** *Evans v. Walter Indus.*, 449 F.3d 1159, 1164 (11th Cir. 2006). (emphasis added). In *Evans*, the Eleventh Circuit recognized an exception only when there is an **express** exception, holding that "when a party seeks to avail itself of an express statutory **exception** to federal jurisdiction granted under CAFA . . . the party seeking remand bears the burden of proof with regard to that **exception**". *Id.* (emphasis added). The instant case presents a question of first impression, namely, whether the § 1332(d)(11)(B)(i) *proviso* that "except that federal jurisdiction shall exist only over [the plaintiffs with $75,000 claims]" constitutes an "**exception** to federal jurisdiction granted under CAFA" as in *Evans* and thus for the first time places the burden of proving the

absence of jurisdiction on plaintiffs. (emphasis added). Alabama Power contends that the burden of proof for establishing the absence of $75,000 in controversy, and thus obtaining a severance and remand, rests upon each plaintiff separately. This argument is based on Alabama Power's reading of the *proviso* as an **exception** to federal jurisdiction and would take *Evans* into new and uncharted territory. Alabama Power misconstrues the meaning of the phrase "exception to federal jurisdiction". As will be demonstrated, the *proviso* is not an "exception".

In *Evans,* the Eleventh Circuit was considering whether the defendant or the plaintiff bears the burden of proving CAFA's "local controversy exception" to jurisdiction after the base requisites of removal jurisdiction had already been met. 449 F.3d at 1161. CAFA's local controversy **exception** provides:

> A district court **shall decline to exercise jurisdiction** under paragraph (2)—
>
> (A)(I) over a class action in which—
>
> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
>
> (II) at least 1 defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons;

28 U.S.C. § 1332(d). (emphasis added).

The Eleventh Circuit concluded that because this is a provision that requires the court to decline an exercise of jurisdiction, even though jurisdiction otherwise exists under CAFA, plaintiffs there had the burden of establishing the requisites for the exception. 449 F.3d at 1164.

The $75,000 limitation in 28 U.S.C. § 1332(d)(11)(B)(i) is quite unlike the local controversy exception of 28 U.S.C. § 1332(d)(4). If there is an absence of $75,000 in controversy, there is no jurisdiction *ab initio* and thus nothing to decline. Federal jurisdiction simply does not exist over claims of less than $75,000. The "local controversy" exception describes a situation in which jurisdiction exists but in which the court must decline to exercise it. Alabama Power's myopic focus on the word "except" does not change this distinction. The $75,000 *proviso* is not an "exception" to federal jurisdiction, but a criterion for determining whether federal jurisdiction exists in the first place. In *Evans*, the Eleventh Circuit squarely recognized that the burden of establishing jurisdiction in a CAFA case is on the party seeking removal, and the $75,000 amount in controversy is a necessary element of federal jurisdiction, upon which the removing defendant has always had and still has the burden of proof. 449 F.3d at 1164.

The same analysis appertains as to the $5,000,000 required for CAFA jurisdiction, although this aggregation concept is contained in a subsection of CAFA separate from the individual $75,000 limitation in "mass action" cases.

2. Has Alabama Power Met Its Burden of Establishing $75,000 in Controversy for Individual Plaintiffs and/or $5,000,000 in Controversy in Total?

While insisting that each plaintiff has the burden of proving the absence of $75,000 in controversy in order to obtain a remand of his claim, Alabama Power takes the fallback position that if it bears the burden of establishing $75,000 in controversy, that burden only applies as to one plaintiff, and that it has met that burden by virtue of counsel's in-court admission, a concession that, according to Alabama Power, reimposes upon plaintiffs the burden of establishing which of them expect to recover less than $75,000 and thus be entitled to a severance and remand.

Alabama Power relies upon the following colloquy that occurred in open court:

> THE COURT: Lloyd [Lloyd Gathings, plaintiffs' counsel], you and Bill [Bill Thomason, plaintiffs' other counsel] seriously think that one or more of your 400 plaintiffs is going to have a shot at more than $75,000?
>
> MR. GATHINGS: One or more, Judge. All of them don't.

Alabama Power's argument loses steam quickly because, even if Mr. Gathings' conclusory statement suggests that under such circumstances the amount-in-

controversy requirement is met as to at least one plaintiff, there is no authority for the proposition that the burden thereupon shifts to plaintiffs to establish that the requirement is **not** met as to all other plaintiffs.[5] Mr. Gathings never mentioned the name of a single plaintiff, much less linked any plaintiff with a particular *ad damnum*. The damages situation remains fluid and amorphous.

Mr. Gathings' in-court statement cannot satisfy Alabama Power's burden of establishing the jurisdictional amount as to some plaintiff or plaintiffs. The statement only reflects Mr. Gathings' belief that at least one of his clients has a claim exceeding $75,000 in value, but the voicing of his opinion cannot establish for which plaintiff or plaintiffs Mr. Gathings holds this belief, or on what his belief is based. Moreover, in response to the court's order requiring plaintiffs to provide

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5. Moreover, the severance and remand that will ultimately occur if the current removal is allowed when it becomes apparent that some of the 419 plaintiffs have claims of less than $75,000 is something to contemplate fearfully. There is no question about the lack of jurisdiction over "mass action" plaintiffs who only seek less than $75,000. On Alabama Power's theory, the court can envision keeping the case of one of 419 plaintiffs, and remanding 418, after two years of discovery. Judicial economy was not totally ignored in CAFA. If the court could, at this juncture, determine which plaintiffs have claims less than $75,000 in value as against Alabama Power, and remand only them, doing so would create a bifurcation that would be productive only of duplicate effort and unknown problems, compounded by the certain fact that either the state court proceeding or the proceeding in this court would end first and impact the other.

information concerning the values of their individual claims, plaintiffs forthrightly explained that they do not know which, if any, have claims that may reasonably be expected to exceed $75,000 in value. Mr. Gathings did not specify, because he could not, which plaintiffs have claims whose values exceed $75,000. This is not his fault. The court can well understand his reluctance to place a cap on individual claims when there remains a lot of discovery to be done on the subject of the damages of various and sundry types possibly suffered by widely divergent plaintiffs.

Defendants' hopeful conjecture based on Alabama jury verdicts in cases that may have some similarity to this case, but are not closely similar, do not suffice to remove the obligation of the removing defendants to prove that the jurisdictional amount exists in a case in which no plaintiff has formally claimed a particular sum, much less a sum more than $75,000. For the fourth and final time, 28 U.S.C. § 1332(d)(11)(B)(i) provides that "jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." The statute does not say that "jurisdiction shall exist over all plaintiffs in a mass action if at least one of them satisfies the jurisdictional amount requirement." Even if Mr. Gathings' statement purported to concede jurisdiction under the foregoing hypothetical version of the statute, it does not do so under the statute as actually written. As already overemphasized, it is Alabama Power's burden to establish the jurisdiction of this court

over **all** claims, and Mr. Gathings' in-court statement did not relieve Alabama Power of its burden.

In the two cases proffered by Alabama Power, plaintiffs sued over alleged pollution and recovered more than $75,000 in an Alabama court. Such anecdotal evidence, although it is quite often cited in notices of removal in diversity cases as proof of the value of a removed claim, is not enough to establish jurisdiction in a "mass action" removal. First, the cited cases are not sufficiently similar to this case to prove by a preponderance of the evidence that any particular one of these 419 plaintiffs has a legitimate expectation of recovering in excess of $75,000. Second, the cited cases do not tend to prove **which,** if any, of plaintiffs' claims exceeds $75,000 in value. Third, the cited cases cannot logically be thought to establish by a preponderance of the evidence that **all** of plaintiffs' claims meet the amount-in-controversy requirement. Mr. Gathings' statement indicates no more than his fond hope that some of his clients will recover more than $75,000. Conspicuously, Alabama Power offers no citation to a case filed by 100 or more individual plaintiffs whose combined claims are held together only because of alleged common questions of law and fact, and in which an Alabama court allowed a total recovery in excess of $5,000,000.

Because Alabama Power has not met its burden of establishing jurisdiction over a single named plaintiff, much less over all plaintiffs, this court cannot keep any part of this case. It cannot logically remand only the claims of those plaintiffs whose cases are worth less than

$75,000 when there is no basis for distinguishing one plaintiff from another. The court cannot merely guess, and cannot retain jurisdiction over the whole case against Alabama Power or any other defendant during the period in which the parties try to ascertain which, if any, of the 419 claims is worth more than $75,000. If the court kept the case temporarily, it would eventually be forced by 28 U.S.C. § 1447(c) to remand most of the claims because it will surely appear after further discovery that they are worth less than $75,000.

III. Alternative Serious Jurisdictional Deficiencies

There are alternative reasons why this case must be, or should, in the interest of justice, be remanded.

First, "the term 'mass action' shall not include any civil action in which ... all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State...." 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Although in the case before the court the facts pertinent to an application of this statutory provision have not been fully developed, it facially appears that the language, if and when applied, will prevent the action from constituting a "mass action", and will destroy CAFA removability.

Second, according to 28 U.S.C. § 1332(d)(11)(A), in order for a "mass action" to be removable, it must meet the general requirements of a "class action" as defined in 28 U.S.C. § 1332(d)(2) through (10). The instant action

falls short of these requirements. The court need not tick off the various failures to meet the "class action" definition. They require evaluation only if the court is incorrect as to other fatal jurisdictional defects already dismissed.

Third, if this action qualifies as a "mass action," the court is required to decline jurisdiction if greater than two-thirds of the plaintiffs are citizens of Alabama, if at least one defendant from whom significant relief is sought is a citizen of Alabama, and if the principal injuries relate to conduct that occurred in the state in Alabama. 28 U.S.C. § 1332(d)(4)(A)(i) (I, II, III). If these statutory provisions are met, a remand becomes mandatory. The fact that under *Evans* the burden of proof on these issues is on plaintiffs, and that in this case plaintiffs have not attempted to affirmatively meet their burden, does not mean that these local controversy facts do not facially appear, or that plaintiffs cannot satisfy their burden after filing a renewed motion to remand. The court cannot find a limitation in CAFA or in *Evans* on the time within which a plaintiff can raise a subject-matter jurisdictional issue such as this one.

IV. Plaintiffs' Motion for Reconsideration of the Court's Order of August 16, 2006

Plaintiffs have requested reconsideration of the August 16, 2006 order requiring them to provide the names and addresses of all plaintiffs whose claims can reasonably be expected to exceed $75,000 in value, together with a one-paragraph explanation as to why

particular claims are worth more than $75,000. As previously discussed in another context, plaintiffs explain that they do not have this information, and ask the court either to set aside the order or to accept their enigmatic answer as a sufficient explanation for their failure to provide the requested information. Believing that plaintiffs cannot be expected to know the values of their claims at this juncture, the court will grant their motion.

V. Conclusion

Because this purported "mass action" was commenced against the original defendants before the enactment of CAFA, those defendants cannot avail themselves of CAFA, and the court accordingly must remand this action as to them. Because the two defendants who were added after CAFA's enactment have failed to establish that this court has subject-matter jurisdiction over the claims of any particular plaintiff, much less over all plaintiffs, the court will also remand the action as to the two defendants added after the enactment of CAFA.

A separate order of remand will be entered.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 3, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-16324-CC
No. 06-16325-CC

KATIE LOWERY,
RICHARD LOWERY,
JOHNNY JONES, et al.,

Plaintiffs-Appellees,

versus

ALABAMA POWER COMPANY,
HONEYWELL INTERNATIONAL, INC.,
HANNA STEEL CORPORATION, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, and PRYOR, Circuit Judges.

Appendix C

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the petition for rehearing en banc and rehearing by panel is DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson

CHIEF JUDGE

APPENDIX D — LIST OF ADDITIONAL RESPONDENTS

1. Valeria M. Adams
2. Clarence Agee
3. Janet Agee
4. Marion Albright
5. Edgar Allen
6. Jeffery D. Allen
7. Tommy Allen
8. Doris Wallace Anderson
9. Betty Ayanwale
10. Emmanuel Ayanwale
11. LaTarshia Bailey
12. Paulette Bailey
13. Roy Bailey, Sr.
14. Roy Bailey, Jr.
15. Clarence Banks, Sr.
16. Polly Banks
17. Bossie Mae Battle
18. Phillip Battle
19. Shirley Battle
20. Cleophus Bearden
21. Gwendolyn Bearden
22. Rameisha Bearden
23. Evelyn Beasley
24. Vernesta Bell
25. Joe Benefield, Jr.
26. Melodie Benefield
27. Tiffany Benefield
28. Cynthia Bennett-Jefferson
29. Irene Berry
30. Bernice Bivins
31. Joanna Black

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32. Cornelius Blaylock
33. Delores Blevins
34. Horace Blevins
35. Jacqueline Body
36. Komis Body
37. Veronica Turner-Boissel
38. Dorothy Bone
39. Gwendolyn Bonner
40. Michael Bonner
41. Terry Ann Bradley
42. Carolyn Brannon
43. Robin Brannon
44. Robert Brannon, Jr.
45. Wanda Byrd Briggs
46. Courtney Brown
47. Jamerle Brown
48. Reginald Brown
49. Rondell Brown, Jr.
50. Willie L. Bryant, Jr.
51. Wanda Bufford
52. Willy James Bufford
53. Barbara Bullock
54. Helen Bullock
55. Tillmon Bullock
56. Charles M. Butler
57. Charles Michael Butler, Jr.
58. Juanita Butler
59. Mary Butler
60. Carl Byrd
61. Michelle Byrd
62. Rayford Byrd
63. Vanessa Briggs Byrd

64. Willie Byrd
65. DeJuan Cade
66. Sheila Cade
67. Willie E. Cade
68. Willie J. Cade
69. Antonio Caffey
70. LaCedric Carter
71. Novella Carter
72. Ora Carter
73. William Carter
74. Linda Cash
75. Arlene Chambers
76. Betty Jean Chames
77. Thomasina Chatman
78. Kathy Clements
79. Fairris Cobb
80. Marcus Cochran
81. Mary Elizabeth Cochran
82. Tiana Coleman
83. LeSandra Collins
84. Patricia Cook
85. Charlie Cooper
86. Patricia Cooper
87. Sandra Crosby
88. Bradford Curry
89. Darryl Curry
90. Carrie Davidson
91. O'livia Davidson
92. Darryl Davis
93. Desmond Davis
94. Edward Davis
95. Edward Davis, Jr.

96. Glenzel Davis
97. Paul Davis
98. Samuel Davis
99. Sondra Davis-Gunn
100. Vanessa Davis
101. Angela Bradley Deloach
102. Charles Deloach
103. Claudette Denson
104. LaTasha Denson
105. Reginal Denson
106. Telese Denson
107. Charles Drakes
108. Barbara Dubose
109. Corey Dubose, Sr.
110. CaSandra Duff
111. Rubin Duff
112. Jackie Edwards
113. Glendon Ethridge
114. Marth Ethridge
115. Darryl Fann
116. Patricia Fann
117. Sophronia Fells
118. Pearlie Fisher
119. Tekeia Fisher
120. Victoria Fisher
121. Khaliah Fitts
122. Joseph Foreman, Jr.
123. Rita Gadsden
124. Roderick Gadsden, Jr.
125. Roderick Gadsden, Sr.
126. Bruce Garner
127. Comerine Garner

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128. Mary Garrett
129. Lizzera Gaston
130. Geraldine Glover
131. Raymond Glover
132. James Gooden
133. Melvin Gant
134. Carl Green
135. Constance Green
136. Napoleon Green, Jr.
137. Ishmywel Gregory
138. Latifah Gregory
139. Vicki Gregory
140. Sherita Gunter
141. Debbie J. Hamby
142. Charlie Hamilton
143. Ella Hamilton
144. Keondra Hampton
145. Ida Mae Hardy
146. Aldonia Hargrove
147. Eddie Hargrove, Jr.
148. Willie Avos Hargrove
149. Cynthia Harris
150. Michael Harris
151. Fanny M. Hayes
152. Arlexie Henderson
153. Rodreicas Hill
154. Zephry Hill
155. Mary Alice Hinton
156. LaQuita Hilton
157. Ola Mae Hilton
158. Deborah Hodge
159. Daniel Holiness, Jr.

160. Hazel Holiness
161. Alfonso Hood
162. Hattie B. Hood
163. J.D. Hood
164. Jimmy Lee Hood
165. Evlener Howard
166. Judge Hunter
167. Kiette Hunter
168. LaCandace Hunter
169. Nakeia Hunter
170. Sandra Hunter
171. Bridget Ivy
172. Marjorie Ivy
173. Shirley Ivy
174. Annie Jackson
175. Beverly Jackson
176. Bobbie Jackson
177. Clyde Jackson
178. John Jackson, Jr.
179. John Jackson, Sr.
180. Reginald Jackson
181. Brenda Jamar
182. Olivia James
183. Walter Lee James
184. Mary Lee Jarman
185. Anthony Johnson, Sr.
186. Benita Johnson
187. Clarence Johnson
188. Derrio'Tay L. Johnson
189. Jerome Mitty Johnson
190. Willie Johnson
191. Clara Jolly

192. Gregory Jones
193. Johnetta Jones
194. Johnne'y Jones
195. Levy Jones
196. Ozbird Jones
197. Rhonda Jones
198. Viola Kelley
199. Leeandrea Key
200. Patrice Key
201. Tomeka King
202. Ora Latham
203. Robin Lauer
204. Anttwan Lawrence
205. April Lawrence
206. Brenda Lawrence
207. Curley Lawrence
208. Jayquwee Lawrence
209. Joyce Lawrence
210. Ronald Lawrence, Jr.
211. Shannon Lawrence
212. Tracy Lawrence
213. Harvey Lawson
214. Sheila Lawson
215. Takiya Lawson
216. Tenya Lawson
217. Troya Lawson
218. Mae Dell Leonard
219. Antonio Levert
220. Zadie Lewis
221. Annie N. Lloyd
222. Minnie Lloyd
223. Willie Lloyd, Jr.

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224. Johnie Mae Mack Loyd
225. Aldonia Lucy
226. Nobie Lucy
227. Roosevelt S.L. Lucy
228. Ramon Luster
229. Yasma Luster
230. Gina Mack
231. James Mack
232. Linda Mack-Webb
233. Lula Mae Mack
234. Michael Major
235. Vondale Mallory
236. Alicia Marshall
237. Felicia Mason
238. Bertha Maxwell
239. Linda Sellers May
240. Ruby McCants
241. Robert McCarty
242. Simuel McConico
243. Deborah McFarland
244. Michael McFarland
245. Danny Meeks
246. Nancy Meeks
247. Dianne Melton
248. Roger Melton
249. Lori Kay Menefee
250. Nathaniel Miller
251. Marcella Moncrief
252. Robert Moncrief
253. Tangela Monett
254. Darryl Moore
255. Debra Moore

256. Fontella Moore
257. James Moore
258. James Moore
259. LaMarse Moore
260. Ola Pearl Moore
261. Willie Morgan, Jr.
262. Bryant Moss
263. Annie J. Murray
264. Alvin Nash, Sr.
265. Caroline Nash
266. Bernice Naugher
267. Annie Lee Parker
268. Daniel Parks
269. Andrea Paulding
270. Earnestine Paulding
271. Orlandis Paulding
272. Orlando Paulding
273. Roshanta Paulding
274. Errica Person
275. Darryl Peterson
276. Valerie Peterson
277. Anthony Powell
278. Kayndraire Powell
279. Mary Mack Powell
280. Quintice Powell
281. Sonseeahray Powell
282. Elizabeth Proctor
283. Julius Purcell
284. Audrey Purifoy
285. Amelia Redd
286. Jermaine Redd
287. Tyesha Redd

288. Hueydean Render
289. Rayquisha Render
290. Shanita Render
291. Harriet Reynolds
292. Kennedy Rice
293. Angela Robinson
294. James A. Robinson
295. Mary Robinson
296. Constance Rodgers
297. Ed Rodgers, Jr.
298. Makeda Rodgers
299. Lila B. Ross
300. Raymond Round
301. Willie Mae Round
302. Myrtle Sankie
303. Edith Cooper Scales
304. Carolyn Scott
305. Grace Scott
306. Kenneth Scott
307. LaDarrius Scott
308. Nikkia Scott
309. Paula Hill Scroggins
310. Catrina Seals
311. Frances Seals
312. Jessie Seals
313. Jessica Seals-Hill
314. William Seals
315. William Seals
316. Ernest Sebastian
317. Era Sellers
318. Phil Sellers, Sr.
319. Phil Sellers, Jr.

320. Tavanka Nicole Sellers
321. Delores Shelton
322. O'Neal Shelton
323. Reginald Shelton
324. Terry Shelton
325. Dorothy Simmons
326. London Sims
327. Anita Smelley
328. William Smelley
329. Alesia Smith
330. Erryca Smith
331. Janice Smith-Foy
332. Juanita Smith
333. Morris Smith
334. Moses Smith
335. Nathaniel Smith
336. Terri Smith Fitzpatrick
337. Wesley Smith
338. Barbara Solomon
339. LaQuita Sparks
340. Roscoe Stephens
341. Willie D. Stephens, Jr.
342. Evera Stevenson
343. Russell Stover
344. Andrew Tabb
345. Adrienne Taylor
346. Carlos Taylor
347. Elnora Taylor
348. Larry Taylor
349. Tonetta Taylor
350. Wanda Taylor
351. Tiuana Thomas

352. Willie B. Thomas, Jr.
353. Douglas Thornton
354. Sonya Tolbert
355. Zelneta Tolbert
356. Vanessa Trotter
357. Brenda Tubbs
358. Lester Tubbs
359. Shaqueta Tubbs
360. Maggie Turner
361. Robert Turner
362. Ethel Vail
363. Gloria Vail
364. J.C. Vail
365. Marion Vail
366. Mary Vail
367. Tommy Vail
368. Charles Vandiver
369. Mary Lou Vandiver
370. Bettye Vann
371. Paula Vassar
372. Cedrick Walker
373. Tywanna Walker
374. Vanessa Walker
375. Willie James Walker, Jr.
376. Willie James Walker, Sr.
377. Barbara Wallace
378. David Wallace
379. Monroe Wallace
380. Delisa Waters
381. Natara Byrd Waters
382. Quarry Waters
383. Michelle Watson

384. Lola Wheeler
385. Timothy White
386. Joey Whitehead
387. Ivy Johnson Whitson
388. James Charles Whitson
389. Sabrina Wisebrook
390. Brenda Williams
391. Carlton Williams
392. Colvin Williams
393. Dorothy Williams
394. Mamie Williams
395. Ralph Williams
396. Walter Williams, Sr.
397. Marcus Willingham
398. Marsha Willingham
399. William Willingham
400 Juanita Willis
401. LaFonza Wilson
402. Nathaniel Wilson
403. Victoria Wilson
404. Joyce Wolfe
405. LaQuaris Woods
406. Beverly Wright
407. Leroy Wright, Jr.
408. Sheila Young

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(4)

No. 07-1246

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the petition, where the Eleventh Circuit's Opinion affirming the district court merely maintains the circuit court's previous position regarding the burden of proof on removal and the evidence upon which removal jurisdiction must be determined. Petitioners are merely dissatisfied with the outcome, which is in accord with the other federal circuits which have considered these questions, and which was dictated largely by Petitioner's failure to include the necessary proof with its removal petition.

LIST OF PARTIES

Respondents are in agreement with the Petitioners' designation of the parties.

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INTRODUCTION

This petition is totally void of any compelling reason for this Court to exercise jurisdiction:

- The Eleventh Circuit's opinion added nothing to the alleged conflict between the federal circuits concerning the burden of proof on removal jurisdiction.
- The burden of proof applied by the Eleventh Circuit to determine diversity jurisdiction on removal is in accord with all federal circuits who have adopted a specific burden of proof.
- Although the Second Circuit labeled the standard adopted the "reasonable probability" test, the Court made it clear that it was applying a "preponderance of the evidence" standard to the jurisdictional evidence. There is no real difference in the practical effect of the differently labeled burden of proof applied by the Second Circuit with the preponderance of the evidence burden applied by the Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits.
- The Eleventh Circuit's position that removal jurisdiction must be determined on the basis of the petition for removal and the documents attached to the petition is consistent with well-established removal procedure among the federal circuits.

Rather, this case involves Petitioners who are dissatisfied with the outcome, which is in accord with the federal circuit decisions which have considered these

questions, and which was dictated largely by Petitioners' failure to include the necessary proof with their removal petition. The questions upon which Petitioners seek a writ of certiorari involve proof of removal jurisdiction in general, as opposed to the specific removal provisions of the Class Action Fairness Act ("CAFA"), which does not speak to either of the questions raised by the Petitioners. The Petitioners repeatedly mischaracterize the statements and holdings of the Eleventh Circuit, wrongly arguing a "'clear' and 'unequivocal' evidence" standard not adopted or applied by the court below. (Pet. at 4). Without such mischaracterizations of the Eleventh Circuit's opinion, Petitioners know they cannot create a sensational result below or a square conflict between the circuits which they obviously feel is necessary for the petition to be granted.

STATEMENT OF THE CASE

1. As noted by the District Court, the determinative question before the district court in this mass action was whether Alabama Power met its burden to establish by a preponderance of the evidence that $75,000 was in controversy for individual plaintiffs or $5,000,000 in controversy for all plaintiffs. While considerable discovery was conducted in the case prior to removal from state court, Alabama Power cited nothing from the voluminous discovery to support its statement that the required jurisdictional amount was in controversy. (Pet. App. 6a, n. 8).

Instead, Alabama Power *after removal* proffered jury verdicts from two other toxic tort cases in Alabama in an attempt to prove the amount in controversy. *Id.* at 110a-111a. The cases were not closely similar to the present case and served as mere "anecdotal evidence" of the amount in controversy. *Id.*

The district court issued an order remanding the case to state court, finding that the removing defendants had not met their burden of proving by a preponderance of the evidence the amount in controversy. *Id.* at 114a.

2. The Eleventh Circuit Court of Appeals granted the defendants' petitions for discretionary review of the district court's remand order pursuant to the provisions of CAFA. 28 U.S.C. § 1453(c). The Court of Appeals affirmed, finding that the defendants had failed to prove by a preponderance of the evidence the requisite jurisdictional amount.

a. The petition wrongly asserts that the Eleventh Circuit held the removing defendants to a "'clear' and 'unequivocal' evidence" standard in establishing the amount in controversy.

(Pet. at 4). Rather, the Court correctly held that an "unambiguous *statement*," *not evidence* as the Petitioners contend, "that clearly establishes federal jurisdiction," must be contained in the petition for removal and supporting documents. (Pet. App. 67a, 79a). (Emphasis Added.) The unambiguous, clear statement is then tested by a "preponderance of the evidence" standard, which, if met by the removing

defendants, establishes the jurisdictional amount on removal. (Pet. App. 60a).

Similarly taken out of context by the Petitioners is the Court's statement concerning the documents and pleadings from the plaintiffs "unambiguously" establishing federal jurisdiction. Where the only documents are those of the plaintiffs, the situation to which the court referred, there is no competing evidence to be judged by a "preponderance of the evidence" standard. Either the pleadings and documents of the plaintiffs do or do not establish jurisdiction.

b. The "preponderance of the evidence" standard is the burden of proof applied on removal by every federal circuit court, with the possible exception of the Second Circuit, which has labeled its standard the "reasonable probability" test but has made clear that the evidentiary standard to be applied is by a "preponderance of the evidence." It is thus fairly clear that despite some difference in labeling of the test, the Second Circuit's standard reflects no real difference in application or effect than that of the other circuits who have adopted a standard. The Eleventh Circuit's decision herein has done nothing to enhance or widen any perceived split, but instead at most has preserved the status quo among the circuits addressing this question. Whether the Eleventh Circuit's decision "puts it at the strictest end of the continuum," as the Petitioners contend, it continues to keep the Eleventh Circuit in line with the other circuits that utilize the preponderance of the evidence for the burden of proof. (Pet. at 4). Further, Petitioners never

argued in the district court or the Eleventh Circuit that any evidentiary standard should be applied other than the "preponderance of the evidence" standard.

The Circuit Court's statement that the court must remand unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them" when taken in context does not depart from the previous holding of the Eleventh Circuit or the well-established practice among the other circuits. The Court's statement was made in the context of a removal petition filed on the basis of pleadings alone which did not set forth the amount in controversy and to which the removing defendants did not attach any discovery, although it was available, or any other proof of the amount in controversy. Thus, *because the defendants did not put anything else before the court at the time of removal to establish the amount in controversy,* the amount in controversy would have to be evident or readily deducible from the pleadings, as pointed out by the Eleventh Circuit.

The Eleventh Circuit did not "candidly" acknowledge raising the burden of proof, as argued in the petition. (Pet. at 9). The Court merely observed that if the defendant can satisfy its burden under the bare pleadings context, when no other documents are submitted to establish the amount in controversy, then a higher burden would also be satisfied since the amount in controversy would be "stated clearly" or "readily deducible" from the face of the pleadings in

this context. (Pet. App. 61a). Thus, the Court did not raise the burden of proof. If the defendants had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal, their burden would have still been by a preponderance of the evidence. (Pet. App. 60a).

The Petitioners' assertion that the Eleventh Circuit's decision allows a plaintiff to "block a defendant's statutory right of removal simply by omitting a sum certain in the complaint" is totally false and unfounded. Indeed, the Eleventh Circuit noted that the removing defendants could have cited, although they did not, to discovery already conducted in the case. (Pet. App. 6a, n. 8). Further, as pointed out by the Eleventh Circuit, if the removing defendants had nothing to prove the amount in controversy, either from their own files, experts or from the plaintiffs, they could have waited for the case to later become removable pursuant to 28 U.S.C. § 1446(b) on the basis of "a copy of an amended pleading, motion or other paper." (Pet. App. 65a).

c. The Eleventh Circuit's prohibition on post-removal discovery to prove the amount in controversy where the removing defendant has cited no factual basis in its petition to support federal jurisdiction is not inconsistent with the well-established authority of the district court to engage "in conduct that is within its inherent power, but falls short of invoking formal discovery, such as questioning a plaintiff's

counsel in open court about the value of the plaintiff's claims." (Pet. App. 78a, n. 75).

3. The defendants filed a petition for rehearing which was denied. The Eleventh Circuit then stayed issuance of its mandate pending proceedings in this Court.

REASONS FOR DENYING THE PETITION

Petitioners have not carried their burden of demonstrating any compelling reasons for the petition to be granted. *See* Sup. Ct. R. 10. There is no indication that the outcome of this case would have been different if the case had been pending in any other circuit, including the Second Circuit. Petitioners never argued in the district court or the Eleventh Circuit that any evidentiary standard should be applied other than the "preponderance of the evidence" standard. The Eleventh Circuit continued to apply the same burden of proof that the court, along with the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, had adopted previously. Further, the Eleventh Circuit's determination that removal jurisdiction must be proved by the petition for removal and the documents attached to the petition is in accordance with the procedures followed by the other circuit courts of appeal. In short, the Eleventh Circuit's decision on the two questions raised by the

Petitioners did nothing other than maintain the status quo.[1]

I. The Eleventh Circuit applied the same burden of proof, the preponderance of the evidence, as previously adopted by the Eleventh Circuit and which is in accord with the other circuits which have adopted a standard.

In its 1996 decision in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996), the Court adopted the "preponderance of the evidence" standard as the removing party's burden of proof for establishing the jurisdictional amount where damages are unspecified. (Pet. App. 55a). The Eleventh Circuit continued to utilize the "preponderance of the evidence" standard in the present case as the burden of proof for the removing party. (Pet. App. 60a). Petitioners admit this is the same burden of proof adopted by the Third, Fifth, Sixth, Seventh and Ninth Circuits. (Pet. at 12). It is also the same burden

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[1] Respondents agree that the mass action provisions of CAFA present important issues of federal law which would benefit from this Court's review. However, the questions raised by the Petitioners are general questions applicable to all cases removed on the basis of diversity of citizenship, as opposed to the specifics of CAFA. Review of the "quagmire" of the CAFA provisions is not sought by the Petitioners. Apparently they are content with the Eleventh Circuit's interpretation of CAFA, although they are not content with losing on well-established, general removal standards.

of proof applied by the Eighth Circuit Court of Appeals. *Toller v. Sagamore Ins. Co.,* 2008 U.S. Dist. LEXIS 27666, *citing, In re Minn. Mut. Life Ins. Co. Sales Practices Litig.,* 346 F.3d 830 (8th Cir. 2003).

While not specifically adopting the "preponderance of the evidence" as the burden of establishing jurisdiction on removal, the Tenth Circuit has pointed out that "courts generally require that a defendant establish the jurisdictional amount by a preponderance of the evidence where the plaintiff's damages are unspecified." *Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1290 (10th Cir. 2001). The Court went on to apply the preponderance of the evidence as the burden of proof. *Id.*

Petitioners contend there is a split between the Circuits regarding the burden of proof because the Second Circuit applies the "reasonable probability" test. However, although a different label may be put on the applicable test by the Second Circuit, that Court has made it clear that the evidentiary burden is really the "preponderance of the evidence" test. Noting that it must appear to a "reasonable probability" that the claim exceeds the statutory amount, the Second Circuit went on to clarify that "[w]here, as here, jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with 'competent proof' and 'justify [its] allegations by *a preponderance of evidence.*'" *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.,* 30 F.3d 298, 305 (2d Cir. 1994), *quoting, McNutt v. General Motors*

Acceptance Corp., 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).[2]

While Petitioners contend that determination of the burden of proof standard is "outcome determinative," those circuits who have adopted a standard, despite the labeling, have tested the jurisdictional evidence by the "preponderance of the evidence" standard. This includes the Eleventh Circuit and the Second Circuit.

The Eleventh Circuit stated below that "Defendants must establish the jurisdictional amount by a preponderance of the evidence." (Pet. App. 60a). Petitioners have attempted to circumvent this clear statement by mischaracterizing the Court's opinion and statements regarding the removal petition. For example, the petition wrongly asserts that the Eleventh Circuit held the removing defendants to a "'clear' and 'unequivocal' evidence" standard in establishing the amount in controversy. (Pet. at 4). Rather, the Court correctly held that an "unambiguous *statement,*" (*not "unambiguous evidence*" as the Petitioners contend), "that clearly establishes federal jurisdiction," must be contained in the petition for removal and supporting documents. (Pet. App. 67a, 79a). (Emphasis Added.) The unambiguous, clear statement is then tested by a "preponderance of the

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[2] The Fourth Circuit has not adopted a standard to be applied in all cases. *Brooks v. GAF Materials Corp.*, 532 F. Supp. 2d 779 (D.S.C. 2008).

evidence" standard, which, if met by the removing defendants, establishes the jurisdictional amount on removal. (Pet. App. 60a).

Similarly taken out of context by the Petitioners is the Court's statement concerning the documents and pleadings from the plaintiffs "unambiguously" establishing federal jurisdiction. Where the only documents are those of the plaintiffs, the situation to which the court referred, there is no competing evidence to be judged by a "preponderance of the evidence" standard. Either the pleadings and documents of the plaintiffs do or do not establish jurisdiction. Obviously, if the operative plaintiffs' complaint alleges the requisite jurisdictional amount, the document shows it "unambiguously" regardless of whether that is the burden of proof.

The Circuit Court's statement that the court must remand unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them" when taken in context does not depart from the previous holding of the Eleventh Circuit or the well-established practice among the other circuits. The Court's statement was made in the context of a removal petition filed on the basis of pleadings alone which did not set forth the amount in controversy and to which the removing defendants did not attach any discovery, although it was available, or any other proof of the amount in controversy. Thus, *because the defendants did not put anything else before the court at the time of removal to establish the amount in*

controversy, the amount in controversy would have to be "clearly on the face of" or "readily deducible" from the pleadings, as pointed out by the Eleventh Circuit. Again, without proof having been submitted by the defendants with their removal petition, there was no evidence to weigh by the "preponderance of the evidence" standard.

The Eleventh Circuit did not "candidly" acknowledge raising the burden of proof, as argued in the petition. (Pet. at 9). The Court merely observed that if the defendant can satisfy its burden under the bare pleadings context, when no other documents are submitted to establish the amount in controversy, then a higher burden would also be satisfied since the amount in controversy would be "stated clearly" or "readily deducible" from the face of the pleadings in this context. (Pet. App. 61a). Because the facts would not only meet the present burden but would also satisfy a higher burden does not raise the burden. To suggest otherwise as the Petitioners have is erroneous legal reasoning. When a plaintiff at trial has an admission from the defendant driver does that raise his burden of proof above the usual burden to "reasonably satisfy" the jury? Of course not.

Thus, the Eleventh Circuit did not raise the burden of proof in this case just because certain facts might satisfy a higher burden. If the defendants had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal, their burden would

have still been by a preponderance of the evidence. (Pet. App. 60a).

The Petitioner's assertion that the Eleventh Circuit's decision allows a plaintiff to "block a defendant's statutory right of removal simply by omitting a sum certain in the complaint" (Pet. at 5) is totally false and unfounded. Indeed, the Eleventh Circuit noted that the removing defendants could have cited, although they did not, to discovery already conducted in the case. (Pet. App. 6a, n. 8). Further, as pointed out by the Eleventh Circuit, if the removing defendants had nothing to prove the amount in controversy, either from their own files, experts or from the plaintiffs, they could have waited for the case to later become removable pursuant to § 1446(b) on the basis of "a copy of an amended pleading, motion or other paper." (Pet. App. 65a).

II. The Eleventh Circuit's holding that removal jurisdiction must be determined by the petition for removal and the documents attached to the petition is consistent with well-established removal procedure among the federal circuits.

Petitioners protestations to the contrary, it is well-established that removal jurisdiction is determined by the record before the court *at the time the removal petition is filed* in federal court. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3723, pp. 568-569. "This means that the federal district court must

attempt to determine the dimensions of the amount put in controversy by the plaintiff's cause of action from the complaint filed by the plaintiff in state court and any amendments thereto, the notice of removal filed with the federal court, and any other relevant materials in the state court record." *Id.* § 3725, pp. 73. *Accord, id.* at § 3721, pp. 319-321.

The Eleventh Circuit's holding in this case that removal jurisdiction cannot be established by discovery conducted after removal to federal court is in exact agreement with the well-established law that removal jurisdiction must be determined on the record in the state court at the time of removal. The decision below neither departs from nor adds to this precedent.

The Eleventh Circuit's opinion regarding jurisdictional discovery after removal is not inconsistent with this Court's precedent cited by Petitioners. The issue of whether discovery can be conducted by a removing defendant after removal in order to prove the jurisdictional amount was not raised or addressed by this Court in *Gibbs v. Buck,* 307 U.S. 66 (1939); *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178 (1936); *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006); *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340 (1978); *U.S. Catholic Conference v. Abortion Rights Mobilization,* 487 U.S. 72 (1988); *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 126 S. Ct. 704 (2005). In fact, none of these cases were removal cases except *Martin*, where the only issue was whether a party should have been sanctioned for filing the removal

petition. Neither of these cases cited by the Petitioners specifically authorized jurisdictional discovery after removal and thus are not conflicted by the Eleventh Circuit's decision below. The Eleventh Circuit's decision applies only to diversity jurisdiction and the propriety of jurisdictional discovery after removal. (Pet. App. 73a, n. 71).

Petitioners also contend the Eleventh Circuit's decision conflicts with the Ninth Circuit's decision in *Abrego Abrego v. Dow Chem. Co.,* 443 F.3d 676 (9th Cir. 2006). While the Ninth Circuit did acknowledge that some district courts allow discovery regarding jurisdiction after removal, the Court went on to hold that discovery is not required and deferred to the district court's discretion not to allow discovery. Thus, had the same standards been applied herein, the result would have been the same – no discovery on jurisdictional issues after removal.

The Fifth Circuit's decision in *Smallwood v. Illinois Central Railroad Company,* 385 F.3d 568 (5th Cir. 2004) is not factually on point with the present case. The Fifth Circuit allowed a summary inquiry with limited discovery on a "tight judicial tether, sharply tailored to the question at hand," to determine whether an in-state defendant had been fraudulently joined in order to defeat diversity jurisdiction. Fraudulent joinder was not an issue in the court below and discovery with regard to that issue was not discussed or considered.

Finally, whether or not some district courts have allowed jurisdictional discovery under similar circumstances as presented by this case, "[a] conflict between a decision of a district court and that of a court of appeals is generally not sufficient ground to grant the writ . . . " 23 MOORE'S FEDERAL PRACTICE, § 510.21[1] (Matthew Bender 3d ed.)

III. The issues raised by the petition, far more perceived than real, do not present important questions of federal law.

The final section of the petition lays one mischaracterization after another, after another, after another, in an attempt to lay the foundation for a writ of certiorari. The issues raised must be real before they can rise to a level of importance in the judicial system. As is abundantly clear from the previous sections, the Eleventh Circuit did not depart from the "preponderance of the evidence" standard – the same standard which has been adopted by every federal circuit that has adopted a standard for the removing party's burden of proof.[3]

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[3] In order to avoid another distraction from the "reasonable probability" label used by the Second Circuit, the Court is reminded that the Second Circuit made it very clear in *United Food & Commercial Workers Union, supra,* that the "reasonable probability" test and the "preponderance of the evidence" test are one and the same in the Second Circuit.

The First Circuit has also noted that the "preponderance of evidence" standard, articulated both as "more likely than not"

(Continued on following page)

Further, the Eleventh Circuit's view of the propriety of discovery on jurisdictional issues after removal does not conflict with this Court's decisions cited by Petitioners. Rather, the Circuit Court's position is in accord with the well-established rule that federal jurisdiction will be judged on the basis of the record in the state court at the time the removal petition is filed.

Finally, despite the Petitioner's protestations, this petition is not about CAFA. Neither of the issues raised have any roots in CAFA nor turn on the provisions of CAFA. The reference to CAFA in the third section of the petition is merely a feeble attempt to inject importance into ill-conceived issues where there is none. If the Petitioners were concerned with CAFA, their petition would include the several CAFA issues of interpretation decided by the lower courts.

This case could have been removed to any of the federal circuits which have adopted a burden of proof for the removing defendant to establish diversity jurisdiction and the result should have been the same. The same rules and procedures would have been applied in any of those circuits. Contrary to the petition, the result would not be governed by the happenstance of venue.

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and as "proof to reasonable probability," appear to be "largely identical" variations. *Nollet v. Palmer,* ___ F. Supp. 2d ___, 2002 U.S. Dist, LEXIS 13564, * 7 n. 3.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the petition. Respondents respectfully request that the petition be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at pages *iii-iv* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

Petitioners have predicted that the Eleventh Circuit's decision below will make diversity removal a dead letter. *See* Pet. at 5, 27. Respondents claim that prediction is "unfounded." BIO at 13. Since Petitioners filed their reply brief, however, district courts in Alabama and Georgia have issued remand orders that eliminate any doubt about how far the Eleventh Circuit's decision deviates from removal practice in other circuits.

1. On May 22, 2008, the Middle District of Alabama remanded a wrongful death case arising from an automobile accident because the complaint did not contain a specific damage request. *Siniard v. Ford Motor Co.*, 2008 WL 2132078 (M.D. Ala. May 22, 2008). Although the decedent's estate sought an unlimited amount of compensatory and punitive damages for the wrongful death, the district court followed *Lowery*'s "significant clarification" of the law and rejected Ford's reliance on proof that Alabama courts routinely enter wrongful death verdicts in excess of $75,000 in products liability cases. *Id.* at *1 (citing *Lowery*, 483 F.3d at 1187).

2. Similarly, on May 20, 2008, the Middle District of Georgia remanded a defamation case despite the defendants' evidence of Georgia cases upholding punitive damage awards well over $75,000. *Buescher v. Falcon Mezzanine Partners*, 2008 WL 2130155 (M.D. Ga. May 20, 2008). Because the plaintiff "did not provide this evidence to [d]efendants," the district court held "it is not the type of evidence courts are to consider." *Id.* at *4 (citing *Lowery*, 483 F.3d at 1215).

These two cases illustrate how the Eleventh Circuit's decision has fixed the scales against removal. The fact that district courts within the Eleventh Circuit are issuing such decisions every week (*see* Reply at 10 n.1) only heightens the importance of the questions presented. Further percolation will only make matters worse. And the Court may not have another vehicle to review the Eleventh Circuit's treatment of these issues. The district court decisions in *Siniard* and *Buescher*, for instance, cannot be appealed due to 28 U.S.C. § 1447(d). If this Court does not review the Eleventh Circuit's decision now, district courts in Alabama, Florida, and Georgia will continue to issue unreviewable remand orders whenever the plaintiff omits a sum certain from the complaint—no matter how catastrophic the damages.

The decision below is the source of the problem. The questions it raises are critically important to defendants who seek to invoke their statutory right of removal with each passing day. This case provides the Court an ideal—perhaps the *only*—vehicle to answer these questions. Certiorari should be granted.

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Petitioners,

v.

KATIE LOWERY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED

This case raises two interrelated questions that determine whether civil actions, class actions, and mass actions may be removed to federal court. On the first question, the Eleventh Circuit widened a longstanding circuit split. On the second question, the Eleventh Circuit's decision contradicts this Court's jurisprudence. The questions are:

1. When a plaintiff fails to seek a sum certain in a state court complaint, what burden must a removing defendant carry to prove the amount in controversy exceeds 28 U.S.C. § 1332's jurisdictional minimum: proof of an "unambiguous statement" by the plaintiff that "clearly establishes jurisdiction," as the Eleventh Circuit held below; proof by a "preponderance of the evidence," as the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits require; or proof by a "reasonable probability," as the Second Circuit requires?

2. If the evidence on the amount in controversy is uncertain, does a district court have discretion to permit discovery concerning the jurisdictional facts, as this Court has held, or is the district court barred from allowing jurisdictional discovery, as the Eleventh Circuit here held?

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ARGUMENT

A subtle irony pervades Respondents' opposition. They argue that what should matter in determining whether this case implicates a split worthy of this Court's attention is not the way the various lower courts have "label[ed]" the removing defendant's burden of proof, but rather what each court has "really," in substance, required defendants to prove. BIO 9. On that reasoning, Respondents assert, the Second Circuit's "reasonable probability" standard does not evince a split; it is "really," they say, the same preponderance-of-the-evidence test other circuits have adopted. *Id.* But having just put substance over form, Respondents then put form over substance. The Eleventh Circuit's requirement of a clear statement unambiguously establishing jurisdiction doesn't diverge from other circuits' law, they say, because the Eleventh Circuit also purported to march under the preponderance-of-the-evidence banner. *See id.* at 10.

Respondents' initial instinct is right: substance, not form, should control. But their end conclusion is wrong. However the Eleventh Circuit might have labeled its analysis, the court was not, in substance, employing the preponderance standard used in other circuits. Respondents cannot invoke a label to paper over this real and significant conflict in federal law. Because that conflict has a profound effect on the everyday practice of law, this Court should resolve it.

I. The Eleventh Circuit's decision implicates a clear and significant split on the burden of proof.

In trying to downplay the widely acknowledged split, *see* Pet. 10–11, Respondents mischaracterize the Eleventh Circuit's decision, misread Second Circuit law, and ignore a host of lower-court decisions that counsel strongly in favor of cert.

A. The Eleventh Circuit's unambiguous-statement requirement is different from the preponderance standard used in other circuits.

As amici attest, the Eleventh Circuit's unambiguous-statement standard, which allows plaintiffs to manipulate their complaints to evade federal jurisdiction, eviscerates defendants' removal rights in three very litigious Deep South states. *See* DRI Br. 8–18; PLAC Br. 19–23. Respondents nevertheless characterize the decision below as "in accord with the other circuits which have adopted a standard" because the Eleventh Circuit "continued to utilize the 'preponderance of the evidence' standard in the present case." BIO 8. But that is an exceedingly formalistic view of what happened below. As our petition noted, it is true that in setting out the unambiguous-statement standard, the Eleventh Circuit formally "glanced toward a preponderance test." Pet. 8. But the standard actually applied by the Eleventh Circuit differs substantively—and markedly—from the preponderance rule applied in other circuits.

1. The Eleventh Circuit, for one, was entirely up-front that it was walking away from the traditional preponderance analysis. The court criticized the standard as "problematic" (Pet. App. 58a), saying it created a "unique tension" (Pet. App. 57a). It said it was "at a loss as to how to apply the preponderance burden meaningfully" and that in its view "any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork" (Pet. App. 60a). Critically, the court acknowledged that if the defendant could "carry the burden of establishing jurisdiction under" its announced unambiguous-statement standard, "then the defendant could have satisfied a far higher burden than preponderance of the evidence." Pet. App. 61a. The court also compared its unambiguous-statement standard with the more stringent "legal certainty" test. Pet. App. 61a n.59.

2. The substance of the Eleventh Circuit's analysis shows that the unambiguous-statement standard differs from the traditional preponderance standard in two key respects. First, a more-likely-than-not assessment of damages will not suffice; the proof must be unambiguous. *See* Pet. App. 61a, 66a & n.63. Second, a defendant's own unambiguous submissions concerning the amount in controversy will not do; the proof must instead come directly from the plaintiff. *See* Pet. App. 66a & n.63. These two differences lead the Eleventh Circuit to disregard at least three different types of evidence—(1) plaintiffs' previous requests for damages exceeding the jurisdictional amount; (2) inferences arising from the sheer number of plaintiffs in the case; and (3) jury verdicts in similar cases—that circuits

applying the traditional preponderance standard routinely allow. *See* Pet. 15–18 (citing cases from the Third, Fifth, and Seventh Circuits). This very case demonstrates that excluding that evidence can change the outcome. *See id.*

3. None of the extensive scholarly commentary on this case supports Respondents' view that the Eleventh Circuit simply applies a traditional preponderance test. Professors Clermont and Eisenberg report that the decision below "all but ridiculed" the preponderance standard. Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. __ (forthcoming June 2008), Draft at 18 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966). The Eleventh Circuit, as they put it, acknowledged that its holding might "in effect push the actual standard toward the higher legal-certainty standard." *Id.* Other commentators characterize the Eleventh Circuit's decision as "wander[ing] far from the mainstream." Thomas M. Byrne & Valerie S. Sanders, *'See No Removal, Hear No Removal': The 11th Circuit's New Posture on Removal in* Lowery v. Alabama Power Co., 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. 11, 15 (Aug. 29, 2007).

4. In an effort to blur the clarity of the Eleventh Circuit's break from the other circuits, Respondents engraft two provisos onto Eleventh Circuit law that, they say, show that the Eleventh Circuit has retained at least some remnant of the traditional preponderance standard. But neither of those provisos can be squared with the Eleventh Circuit's opinion, and neither makes sense.

a. Respondents first assert that in the Eleventh Circuit, the preponderance rule remains the standard against which the plaintiff's "unambiguous, clear statement" is "tested." BIO 10. Respondents do not explain how or why a court would "test" an unambiguous statement in this way. Regardless, the Eleventh Circuit did not adopt a "test[ing]" protocol, but instead the following rigid, up-or-down toggle:

> If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand.

Pet. App. 61a. Under the Eleventh Circuit's view, the removing documents either include an unambiguous statement, or they don't. They *are* the evidence. No other evidence—preponderance or otherwise—has a "test[ing]" role to play.

b. Respondents also posit that the Eleventh Circuit applies its unambiguous-statement standard only when the removing defendant submits no evidence of the jurisdictional amount other than the pleadings. So, their argument goes, "[i]f the defendants [here] had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal," Petitioners' "burden would have still been by a preponderance of the evidence." BIO 12–13. But Respondents' revisionism doesn't mesh with what actually happened in this case.

Here, the Eleventh Circuit applied the unambiguous-statement requirement even though the removing defendants *did* submit "proof of the amount in controversy" besides the "pleadings." BIO 11. The very question before the Eleventh Circuit was whether the three kinds of proof Alabama Power submitted in its supplement to its removal notice—(1) evidence of settlements and verdicts in similar toxic-tort cases; (2) inferences based on the sheer number of plaintiffs; and (3) the plaintiffs' previous requests for $1.25 million apiece, *see* Pet. 7—established the jurisdictional amount. The Eleventh Circuit analyzed this evidence under the unambiguous-statement standard and found that the evidence could not "satisfy the defendants' burden in proving jurisdiction." Pet. App. 82a–86a. To the extent the Eleventh Circuit saw this as a "fact-free context," Pet. App. 57a, it was only that way because the court refused to consider the "fact[s]" the defendants put forward. The Eleventh Circuit's actions show that it applies the unambiguous-statement standard—and eschews the traditional preponderance standard—even when the defendant has submitted evidence in addition to the pleadings.

B. The Eleventh Circuit's unambiguous-statement requirement breaks from the Second Circuit's reasonable-probability standard.

In addition to creating a stark disparity between removal law in the Eleventh Circuit and in traditional preponderance jurisdictions like the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, the substance of the Eleventh Circuit's analysis is also fundamentally

different from the Second Circuit's "reasonable probability" rule. Respondents dismiss that notion, arguing that the reasonable-probability standard "is really the 'preponderance of the evidence' test." BIO 9. But district courts within the Second Circuit say otherwise. *See, e.g., Ball v. Hershey Foods*, 842 F. Supp. 44, 47 (D. Conn. 1993) (describing the defendant's burden under the reasonable-probability standard as "not a heavy one"), *aff'd*, 14 F.3d 591 (2d Cir. 1993) (Table). In any event, the decision on which Respondents rely—*United Food & Commercial Workers Union v. Centermark Properties Meriden Square*, 30 F. 3d 298 (2d Cir. 1994)—makes clear that the Second Circuit's approach is far less exacting than the Eleventh's. There, the Second Circuit cited with approval a district-court decision that calculated the amount in controversy based on an affidavit submitted not by the plaintiff—as the Eleventh Circuit would have required—but by the removing defendant. *See id.* at 305. And in *United Food* itself, the Second Circuit remanded to allow both parties, including the removing defendant, "to submit evidence on the amount in controversy." *Id.* at 306. Under the Eleventh Circuit's analysis, that remand would have been neither necessary nor appropriate. The pleadings either would have, or wouldn't have, supplied an unambiguous statement establishing jurisdiction; and that would have been the end of the matter.

C. District-court decisions adopting the legal-certainty test exacerbate the split.

The Eleventh Circuit equated its approach with the stringent "legal certainty" test, Pet. App. 61a n.59, and Respondents ignore the numerous district-court

decisions that have adopted that approach, *see* Pet. 11 n.2; *see also* Pet. 14 n.4 (describing some district courts' use of an "inverted legal certainty" test). While district-court division might not merit mention in most cert papers, it is, as this Court has recognized, noteworthy in this particular context. Because 28 U.S.C. § 1447(d) bars appeals of most remand orders in non-class-action cases, the circuits rarely have an opportunity to iron out differences between the district courts on removal issues. So when this Court has had the opportunity to resolve removal-related splits in the past, it has done so even in the absence of full-fledged disagreement among the circuits. *See, e.g., Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999) (noting certiorari was granted on removal question due to a split populated, on one side, solely by district courts). This case presents this Court with the rare opportunity to bring uniformity to this critical area of the law.

II. The Eleventh Circuit's bar on discovery also warrants review.

When this Court reviews the Eleventh Circuit's stringent approach to the burden of proof, it should also review the Eleventh Circuit's correspondingly stringent take on jurisdictional discovery, which conflicts with this Court's decisions and creates a circuit split of its own.

1. Employing fine distinctions, Respondents try to alleviate the tension between the Eleventh Circuit's ruling and this Court's decisions on jurisdictional discovery. But the fact that only one of those decisions was a "removal" case (BIO 14)—and that none "specifically authorized jurisdictional discovery after

removal" (BIO 15)—is beside the larger point. The point is that this Court's decisions give district courts wide latitude to conduct jurisdictional discovery, and that is difficult to square with the Eleventh Circuit's unyielding bar.

2. Respondents' reliance on Wright and Miller is likewise off-point. *See* BIO 13–14. It is an uncontroversial proposition that district courts should assess their jurisdiction in terms of the amount that was in controversy at the time the case was removed. But no sound principle would limit district courts, in determining what that amount was, to *evidence that was in the record* at that time—particularly when the plaintiffs have refused to specify that amount in the state court.

3. In any event, Respondents do not deny that the Eleventh Circuit's bar on discovery creates a 1-1 circuit split. *See* Pet. 22 (citing *Abrego Abrego v. Dow Chem.*, 443 F.3d 676, 679 (9th Cir. 2006)). They instead argue that even under the Ninth Circuit's approach, "the result would have been the same" here because the Ninth Circuit also recognizes that in some cases district courts have discretion *not* to allow discovery. BIO 15. That, of course, does not change the fact that the circuits are now split on the question whether district courts have discretion to *allow* discovery. But in any event, there is no indication that the result in this case would have been the same had it been decided in the Ninth Circuit. The district court here declined to allow discovery based on its mistaken assumption that the jurisdictional amount was $75,000 per plaintiff (Pet. App. 95a–97a), rather than (as the Eleventh Circuit

held) the approximate $12,500 per plaintiff required under CAFA (Pet. App. 45a–52a). If the Eleventh Circuit had remanded to allow the district court to consider whether discovery would be useful on *that* amount, the district court's calculus would have been decidedly different.

III. This case is important.

Though Respondents suggest that our concerns are "more perceived than real" (BIO 16), the participation of amici like the Defense Research Institute and the Products Liability Advisory Council testifies to this case's real-world importance to the practicing bar. So, too, does the vast number of district-court decisions that, in the year since the decision below, have cited the Eleventh Circuit's opinion and reflexively (and with little prospect for appellate review) remanded cases.[1] Respondents have yet to explain how, under the

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[1] *See, e.g., Beasley v. Fred's Inc.*, 2008 WL 899249, at *2 (S.D. Ala.) (remanding after refusing to consider damages awards in similar cases); *Channell v. Nutrition Distribution*, 2008 WL 220934, at *1 (M.D. Ala.) (remanding despite plaintiff's request for compensatory and punitive damages flowing from liver failure); *Pearson's Pharmacy v. Blue Cross & Blue Shield*, 2007 WL 3496031, at *2 (M.D. Ala.) (remanding despite defendant's observation that each plaintiff need only seek $625 to meet CAFA jurisdictional amount); *Carswell v. Sears, Roebuck*, 2007 WL 1697003, at *1 (M.D. Ala.) (remanding despite plaintiff's request for over $38,000 in medical expenses plus unspecified claims for pain and suffering, mental anguish, and punitive damages); *Thrift Auto Repair v. U.S. Bancorp*, 2007 WL 2788465, at *3 (N.D. Ga.) (remanding after refusing to consider affidavit produced by the defendant).

Eleventh Circuit's approach, a diverse defendant can ever remove its case when the plaintiffs refuse to specify a sum certain in their complaint and to stipulate to one during state-court discovery. In shutting the door to federal court, the Eleventh Circuit's decision substantially affects interstate commerce and reworks the federal-state balance.

The need for this Court's consideration is even more pressing in light of the Class Action Fairness Act. While it is true that this case does not "turn on the provisions of CAFA" (BIO 17), the goals Congress sought to achieve in that statute will be thwarted, in three litigious states, by the tight restraints the Eleventh Circuit has now placed on removal in *all* cases. Under the Eleventh Circuit's twin rulings, a diverse defendant who wishes to remove a case will be forced to rely on the willingness of a state court to compel the plaintiffs, through discovery mechanisms, to specify the precise damages they seek. But it is from those same courts that CAFA—and removal more generally—is supposed to protect defendants.

This case's history provides compelling evidence that defendants cannot rely on these sorts of state-court discovery mechanisms. After years in which the defendants repeatedly requested that Respondents specify their precise damages, the sum total of what Respondents now call the "voluminous" discovery on this question (BIO 12) was each plaintiff's stock response to the following effect:

> Plaintiffs cannot state an exact amount of compensatory damages as such amount will

> be within the sound discretion of the jury. Plaintiffs have lost the use and enjoyment of their property due to the conduct of defendants. Plaintiffs believe that their property value has been decreased due to the pollution of defendants. Plaintiffs have suffered mental anguish damages due to their worrying about health consequences of the pollution, loss of property value and loss of use and enjoyment of their property.

Doc 38 Ex.A, Attachment 62, Ex.5 at ¶27. Because this response does not come close to the unambiguous statement the Eleventh Circuit demands—and because the Eleventh Circuit precludes defendants from compelling plaintiffs to make more specific disclosures through post-removal discovery—the Eleventh Circuit's decision allows plaintiffs to evade federal jurisdiction by stonewalling. This major reworking of federal jurisdiction warrants this Court's review.

Conclusion

This Court should grant certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

HANNA STEEL CORPORATION, *et al.*,
Petitioners,

v.

KATIE LOWERY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit association with more than 120 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as *amicus curiae* in both state and federal courts, including at least 69 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and the parties consented to its filing. Copies of these consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made monetary contribution to the preparation or submission of this brief.

[2] A list of PLAC's current corporate membership is included as Appendix A to this brief.

PLAC's members often have confronted the contradictory interpretations of the different circuit courts regarding the standard for pleading diversity jurisdiction in removal. PLAC therefore is well positioned to offer a broader perspective on the issues in this case than the parties may be able to provide.

SUMMARY OF ARGUMENT

This case presents two basic questions — what is the proper pleading standard for removing a case based on diversity; and what is the proper procedure for considering a motion to remand? More specifically, what allegations must be set out in a notice of removal; and what evidence may a court consider, and according to what burden, to determine whether remand is proper? As shown in the Petition, courts have come up with at least four distinct and conflicting answers to these questions. *See* Pet. at pp. 10-15. Indeed, during the 70 years since this Court last touched on these issues, this conflict has become an uncomfortable fact of life for defendants contemplating removal. Depending upon which rule applies, a case readily removable in one circuit may subject the defendant to sanctions for attempting removal in another.

This untenable conflict has continued to sharpen even though the key to resolving it has been hiding in plain sight for almost two decades. In 1988, Congress amended 28 U.S.C. § 1446 to make clear that the same notice pleading rules applicable to a complaint apply to a notice of removal. In other words, Congress intended that "the same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of

removal." 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3733 (3d ed. 1998). Unfortunately, many courts overlooked the amendment to section 1446 and, as a result, missed an opportunity to resolve the conflict.

In the last year, however, two circuits, the Fourth and the Eleventh (in this case), both examined the 1988 amendment. As fate would have it, they reached precisely opposite conclusions and thereby opened up yet another fissure in the already fractious split among the circuits.

In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008), the Fourth Circuit observed that the language of 28 U.S.C. § 1446(a) "is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure." *Id.* Accordingly, "just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter of controversy exceeds, exclusive of interests and costs, the sum specified by 28 U.S.C. § 1332,' so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner." *Id.* at 200 (citation omitted). The court also made it clear that, under appropriate circumstances, a defendant may plead the jurisdictional amount "on information and belief." *See id.*

In stark contrast, the Eleventh Circuit in this case looked at the same language of the same amended

statute and reached a very different conclusion. Instead of the notice pleading standard applicable to complaints originally filed in federal court, the Eleventh Circuit imposed a dramatically heightened burden on the removing defendant. Specifically, a notice of removal is inadequate on its face unless it "unambiguously establish[es] federal jurisdiction" by reference to the complaint or other document received by the defendant from the plaintiff. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1213 (11th Cir. 2007) (remanding because the notice of removal "asserted no factual basis" to support jurisdiction), *petition for cert. filed*, 76 U.S.L.W. 3540 (U.S. Apr. 1, 2008). In a case like this one, the removing defendant may not rely on any other type of evidence in formulating its jurisdictional allegation no matter how clearly the evidence supports the allegation.[3] *See id.* at 1211. Nor may the defendant rely on jurisdictional allegations pleaded on information and belief as would otherwise be appropriate under FED. R. CIV. P. 11. On the

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[3] In dicta, the court hypothesized that a defendant may be able to rely on other types of evidence where "the underlying substantive law provides a rule that allows the court to determine the amount of damages." *Lowery*, 483 F.3d at 1215. As an example, it noted that, in a breach of contract case, a defendant may be able to rely on the contract itself assuming it contains a liquidated damages provision. *Id.* This "legal rule" restriction appears without basis, and, as a practical matter, it excludes a wide variety of cases in which limited extrinsic evidence might shed significant light on the amount in controversy. For example, in the product liability context, certain types of personal injuries, such as the loss of a limb, are routinely measured according to the actuarial tables. Such evidence would be strictly excluded under *Lowery*'s narrow exception.

contrary, a defendant in the Eleventh Circuit must have proof "unambiguously establish[ing] federal jurisdiction" *before* even contemplating removal. *Id.* at 1214.

Lowery cannot be squared with either *Ellenburg* or 28 U.S.C. § 1446. Both teach that a notice of removal should be treated like any other pleading under Rule 8. What flows from this is a fair and easy-to-follow procedure for testing the sufficiency of jurisdictional allegations upon removal. First, the removing defendant must offer a "short and plain statement of the grounds for removal" consistent with Rules 8 and 11. Far from requiring the defendant to await evidence in the form of a "clear and unambiguous statement" from the plaintiff, the removing defendant is free to rely on *either* (1) facts the defendant believes, "after an inquiry reasonable under the circumstances," support the jurisdictional allegations *or* (2) allegations the defendant believes are "likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b). Second, any challenge to otherwise adequately pleaded jurisdictional allegations in the removal notice is to be resolved in the same way it would be if the case had been originally filed in federal court. *See, e.g., Ellenburg*, 519 F.3d at 200.

Although this kind of procedure may apply in the Fourth Circuit, it has been squarely rejected in the Eleventh. Indeed, after *Lowery*, it is truer than ever that a defendant's right to remove a diversity case turns as much (if not more) on *where* the case was filed than on whether the requirements of section 1332 have been met. Moreover, at least in the Eleventh Circuit,

the deck is now stacked against defendants so that it will often be impossible to remove cases in which jurisdiction would never have been questioned, had the cases been originally filed in federal court. It is exactly this sort of procedural bias against removal that Congress sought to eliminate in amending section 1446.

With *Lowery*, the time is ripe for this Court to bring an end to the decades-old split that has divided the circuits and created inconsistent, unpredictable, and unfair outcomes in cases removed to federal court. PLAC therefore respectfully urges the Court to grant the Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE 1988 AMENDMENT TO 28 U.S.C. § 1446 POINTS THE WAY OUT OF A DECADES-OLD CIRCUIT SPLIT ON THE REMOVING DEFENDANT'S BURDEN FOR PLEADING AND PROVING THE AMOUNT IN CONTROVERSY.

In 1988, Congress enacted the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669. The Act made several changes to the removal procedure statute (28 U.S.C. § 1446) intended to bring removal procedure in line with the liberal rules applicable to pleading jurisdiction in the Federal Rules of Civil Procedure. Specifically, Congress (1) changed the mechanism for effecting removal from a "petition for removal" to a "notice of removal"; (2) changed the requirements for alleging jurisdiction from "a short and plain statement

of the facts which entitle him or them to remove" to "a short and plain statement of the grounds for removal"; (3) changed the "verified petition" to a "notice" signed pursuant to Rule 11; and (4) abolished the bond requirement imposing a mandatory cost for removal. *See* 28 U.S.C.A. 1446 Historical and Statutory Notes on 1988 Amendments (West 2006).

Together, these changes signaled that a complaint and a notice of removal are to be treated equally for purposes of establishing original jurisdiction. Where the "petition" under the old procedure must be acted upon by the court, the "notice" actually removes the case from state court and places it on the federal docket (as would a complaint).[4] "Prior to the 1988 revision of Section 1446(a), the petition for removal was required to contain a 'short and plain statement of the facts' that entitled defendants to remove. . . . This requirement has been modified to require only that the grounds for removal be stated in 'a short and plain statement' — terms borrowed from the pleading requirement set forth in Federal Rule of Civil Procedure 8(a)." 14C WRIGHT, MILLER & COOPER, *supra* § 3733.

In the legislative history of the 1988 Act, Congress made clear that the purpose of these changes was to "simplify the 'pleading' requirements for removal." H.R. REP. No. 100-889, at 71 (1988) *as reprinted in*

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[4] This change was reinforced by the 1991 Amendment to the Act. This amendment changed "petition for" to "notice of" throughout the statute. Act of Dec. 9, 1991, Pub. L. No. 102-198, § 10(a)(1), 105 Stat. 1623, 1626.

1988 U.S.C.C.A.N. 5982, 6031. Congress further explained that "[t]he present requirement that the petition [for] removal state *the facts* supporting removal has led some courts to required detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)." *Id.* at 71-72 (emphasis added). As for the deletion of the old bond and verification requirements, Congress noted that they too were out of step with Rule 8. *See id.* at 72 ("[a] bond is not required on filing an action, and should not be required on removal.").[5]

After the amendment to § 1446, pleading the "amount in controversy" in a notice of removal becomes a straightforward exercise. As Wright & Miller note: "Although it has been said that the requirement of this jurisdictional statement is 'a strict one,' and that a 'mere conclusion' is insufficient, the better rule is that detailed grounds for removal need not be set forth in the notice. Rather it should be sufficient if the court is provided the facts from which removal jurisdiction can be determined. Thus, the same liberal rules employed

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[5] Interestingly, the Long Range Plan for the Federal Courts prepared by the Judicial Conference of the United States advised Congress to change the diversity statute to require plaintiffs to "plead specific facts" to satisfy the jurisdictional amount. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, RECOMMENDATION 7 at 29-32 (1995), *available at* http://www.uscourts.gov/lrp/CHO4.PDF. Congress has declined to enact such a change.

in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal." 14C WRIGHT, MILLER & COOPER, *supra* § 3733 (citing cases). This consideration follows the procedure long endorsed for pleading the "amount in controversy" in a complaint by the Federal Rules themselves. *See* FED. R. CIV. P. APP. OF FORMS, Form 2(a) (showing that it is sufficient to plead that the "matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332").

Because the jurisdictional allegations in a notice of removal and those in a complaint are to be treated the same, it follows that the procedure for challenging the existence of subject matter jurisdiction should be the same. Accordingly, the procedure for assessing a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) should provide accurate guidance regarding the proper procedure for assessing a 28 U.S.C. § 1447 motion to remand for lack of subject matter jurisdiction. Again, Wright & Miller:

> [A] motion under Rule 12(b)(1) may be used to attack two different types of jurisdiction defects. The first is the pleader's failure to comply with the pleading obligation set out in Rule 8(a)(1), which means that the allegations in the complaint are insufficient to show that the federal court has jurisdiction over the subject matter of the case as the rule requires. . . . The other defect that may be challenged under Rule 12(b)(1). . . is that the district court actually lacks jurisdiction over the subject matter, a defect that may exist despite the formal

> sufficiency of the Rule 8(a)(1) allegations in the complaint.
>
> When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. Conversely, the pleader may establish the actual existence of subject matter jurisdiction through extra-judicial material.
>
> [O]nce a factual attack is made on the federal court's subject matter jurisdiction, the district judge is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter.

5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2004). The burden on the proponent of jurisdiction has been described as follows: "When the statement of jurisdictional amount [pled by the plaintiff] is traversed by the defendant, that allegation will control and be upheld except when it appears to a legal certainty from the complaint or other proofs that the plaintiff cannot in good faith claim the jurisdictional amount." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1213 (3d ed. 2004).

II. RECENTLY, THE FOURTH CIRCUIT GOT THE ANALYSIS EXACTLY RIGHT.

In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 195 (4th Cir. 2008), the defendant removed a product liability case in which the complaint made no reference to the amount in controversy. In the removal notice, the defendant pleaded the amount in controversy as follows:

> The value of the matter in dispute in this case, upon information and belief, exceeds the sum of Seventy Five Thousand and No/100 ($75,000) Dollars, exclusive of interest and costs, as it appears from the allegations in Plaintiff's Complaint. Defendants' counsel believes in good faith that the amount in controversy in this case meets and exceeds the $75,000 limit required for diversity jurisdiction.

Id. at 195. The district court *sua sponte* entered an order of remand because the notice "was inadequate to establish ... the amount in controversy ... and that therefore the Defendants failed to bear the burden of establishing that the Court ha[d] jurisdiction over the matters for purposes of removal." *Id.* In reversing the district court, the Fourth Circuit observed that 28 U.S.C. § 1446(a)

> requires that a Notice of Removal contain only 'a short and plain statement of the grounds for removal' and that it be 'signed pursuant to Rule 11.' While a notice of removal is not a pleading as defined by Federal Rule of Civil Procedure 7(a), the language in § 1446(a) is deliberately

> parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure.

Id. at 199. The court also examined the legislative history and concluded that it supported this reasoning. *Id.* at 200.

> Accordingly, we conclude that it was inappropriate for the district court to have required a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint. Therefore, just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332, *see* Fed. R. Civ. P. 84; Fed. R. Civ. P. app. Form 2(a), so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner.

Id. at 200.

Finally, the Fourth Circuit correctly assessed the burden of proving jurisdiction where there has been a challenge, not to the sufficiency of the notice of removal, but to the existence of jurisdiction at all. "Of course, '[t]he party seeking removal bears the burden of demonstrating that removal jurisdiction is proper. But this burden is no greater than is required to establish federal jurisdiction as alleged in a

complaint." *Id.* (citation omitted). *See also Frederico v. Home Depot*, 507 F.3d 188, 197 (3d Cir. 2007) (noting that "a defendant's notice of removal serves the same function as the complaint" and finding that, if the plaintiff does not specifically plead the amount is below the threshold, the case may be remanded only if the plaintiff proves to a legal certainty that he cannot recover the jurisdictional amount).

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH CONGRESSIONAL INTENT, THIS COURT'S PRECEDENT, AND THE OPINIONS OF SISTER CIRCUITS.

As we have seen, Congress intended a notice of removal and a motion to remand to be judged according to ordinary pleading rules. *Lowery* cannot, however, be squared with either Congressional intent, the ordinary rules of pleading, or the opinions of sister circuits like the Fourth.

According to *Lowery*, "[i]f the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach, jurisdiction is either evidenced from the removing documents or remand is appropriate." *Lowery*, 483 F.3d at 1211. *Lowery* further held that a notice of removal is defective if the complaint and the notice of removal together do not "unambiguously establish federal jurisdiction." *Id.* at 1213; *see also id.* at n.63 ("[T]he document received by the defendant [showing federal jurisdiction] must contain an unambiguous statement that clearly

establishes federal jurisdiction."). *Lowery* concluded that the case under consideration had to be remanded because the defendant "asserted no factual basis to support federal jurisdiction" in the notice of removal. *Id.* at 1217. In so doing, *Lowery* adopted a *heightened* pleading standard for removing defendants, not unlike the standard for pleading found under Federal Rule of Civil Procedure 9.

As a threshold matter, the *Lowery* standard contradicts Congressional intent because, under § 1446, the pleading standard for a notice of removal is "stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)" — the "notice pleading" standard. H.R. REP. No. 100-889, at 71 (1988).

Moreover, while conceding that a court can assume that the representation made by a plaintiff who files originally in federal court "is made in good faith and that the plaintiff has factual bases for believing that the federal court has jurisdiction to hear the claims," *Lowery* refuses to extend that same presumption to the jurisdictional allegations in a notice of removal. Instead, *Lowery* forbids the defendant to file "a notice of removal prior to receiving clear evidence that the action satisfies the jurisdictional requirements." *Lowery*, 483 F.3d at 1217. This double standard belies any fidelity to symmetric Rule 8 and 11 standards for both the complaint and the notice of removal.

Compounding matters further, *Lowery* holds that "[i]n the absence of [some other paper from the plaintiff unequivocally showing the jurisdictional amount], the defendant's appraisal of the amount in

controversy may be purely speculative and will ordinarily not provide grounds for his counsel to sign a notice of removal in good faith." *Lowery*, 483 F.3d at 1215. "We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us — where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice — without seriously testing the limits of compliance with Rule 11." *Id.* Respectfully, the court has it exactly backwards. Far from supporting the heightened pleading standard imposed by the court, Rule 11 disproves it. As bears repeating, Rule 11 places no restriction on the type of evidence a plaintiff or defendant can rely on to plead the jurisdictional amount. Indeed, the Rule expressly permits the pleading party to rely on no evidence at all as long as the pleader says the allegations "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11.

The Eleventh Circuit's analysis also fails to appreciate the nature of the proof oftentimes applicable in removed cases. The Fourth Circuit's *Ellenburg* ca. e provides an excellent example. There, the complaint was silent as to the amount in controversy in an action to recover the purchase price for a recreational vehicle. The defendant, however, had in its possession a bill of sale for $327,669. *Ellenburg*, 519 F.3d at 195. Under *Lowery*, the defendants' reliance on this foundation in pleading the amount in controversy would not only be improper, it would violate Rule 11. *See, e.g.*, *Lowery*, 483 F.3d at 1215. It is impossible to square this interpretation

with either Rule 11 itself or section 1446 — or with fundamental fairness. Surely, it cannot be correct that reliance on this type of evidence runs afoul of Rule 11.[6]

Under the Rule 12(b)(1) procedure, the court may certainly pierce the pleadings and consider relevant evidence on jurisdiction. The court may also, in its discretion, permit limited jurisdictional discovery. But *Lowery* pays only the barest of lip service to the first of these propositions and denies the second completely. "Post-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rule of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them." *Lowery*, 483 F.3d at 1215.

Once again, *Lowery* has it backwards. Rules 8 and 11 do not require the pleader to take discovery first and plead (with particularity) second. On the contrary, these rules contemplate only "short and plain" allegations backed by a "reasonable" pre-filing inquiry. They also expressly permit the pleading party

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[6] Part of this misunderstanding might stem from *Lowery*'s erroneous conclusion that any "other paper" in § 1446 must come from either the plaintiff or the court. *See Lowery*, 483 F.3d at 1213 n.63 ("Under the second paragraph, a case becomes removable when... [a paper is] received from the plaintiff (or from the court, if the document is an order)."). That restriction does not appear in the plain language of the statute, and it does not make sense in any event. For example, plaintiffs draw from many sources outside their own personal knowledge in determining their estimated damages and amount in controversy. The same should be true for removing defendants.

to advance allegations "on information and belief" (which are, by definition, "speculative") where such allegations "are likely to have evidentiary support ***after*** a reasonable opportunity for further investigation or ***discovery*** ...." FED. R. CIV. P. 11(b)(4) (emphasis added); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2009 (2d ed. 1994). ("Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper.")

In short, *Lowery*'s idiosyncratic interpretation of the interplay between Rule 8, Rule 11, and § 1446 is at odds with the plain text of these rules and statutes, Congressional intent, and sister circuits. The inevitable result of all of this is that artful pleading is back in full force in the Eleventh Circuit; he who holds the pen to draft the Complaint has unilateral power to prevent removal jurisdiction, simply by omitting any reference to the amount in controversy.

IV. ALTHOUGH THIS COURT HAS RECENTLY CLARIFIED PLEADING REQUIREMENTS FOR COMPLAINTS, IT HAS NOT ADDRESSED SUCH REQUIREMENTS FOR REMOVAL PAPERS SINCE 1938.

This Court first construed an act of Congress so as to avoid infringing on the defendant's "right of removal" in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92, 101 (1898) (construing the removal statute liberally to allow amendments to the removal petition to reflect jurisdictional facts bearing on

diversity). Other early decisions assessed archaic pleading requirements for removing on the grounds of diversity jurisdiction. *See, e.g., Hay v. May Dep't Stores Co.*, 271 U.S. 318 (1926). Later decisions considered the propriety of reviewing matters beyond the pleadings, *see Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) (when reviewing a removal petition, "it is proper to treat the removal petition as if it has been amended to include the relevant information in the later-filed affidvits"), and ancillary removal concerns such as whether a removing defendant may aggregate damages of multiple plaintiffs to meet the amount in controversy requirement, *see, e.g., Snyder v. Harris*, 394 U.S. 332 (1969). But no decisions of this Court have clearly set out the pleading requirements for a notice of removal in the modern era (after the 1988 amendment), nor have they explained the proper procedure and burden for assessing a challenge to subject matter jurisdiction by a remand motion.[7]

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[7] Although this Court has not addressed these issues directly, it did recently suggest that the anti-removal bias evidenced in the approach endorsed by *Lowery* is inconsistent with Congressional intent:

> By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants. If fee shifting were automatic, defendants might choose to exercise this right only in cases where the right to remove was obvious. *See Christiansburg Garmet, supra*, at 422 (awarding fees simply because the party did not prevail "could discourage all but the most airtight claims, for seldom can a [party] be sure of ultimate success"). *But there is no reason to suppose Congress*

As shown above, twenty years ago, Congress amended the removal statute to clarify the pleading requirements to establish diversity jurisdiction on removal. Yet even in the wake of that amendment, courts have continued to be unable to reach a consistent interpretation that lends predictability and uniformity to an area of the law in great need of both. The recent decisions in the Fourth and Eleventh circuits lay bare the depth of this confusion, as both courts examined precisely the same statute and legislative history and yet reached opposite conclusions as to their effect. The time is ripe for this Court to grant certiorari so that it may set out, once and for all, the appropriate removal and remand procedure.

V. THE CONSEQUENCES OF ONGOING CONFLICTS AMONGST THE DISTRICT AND CIRCUIT COURTS ARE GRAVE.

A defendant's "right to remove" is important. For many of PLAC's members in particular, foreign state courts might be hostile venues for reasons wholly unrelated to the merits of the case. Avoiding local prejudice is one of the historic bases for federal diversity jurisdiction. Indeed, the Framers recognized this unfortunate reality — specifically including populist prejudices against foreign commercial

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meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases.

Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005) (emphasis added).

defendants — and established federal diversity jurisdiction to neutralize it. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 82-83 (1923). According to Professor Warren:

> The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens. . . . There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction.

Id.

The nature of local prejudice may have evolved over time, but it has never left us.[8] Congress has continued to recognize this, most recently in the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 118 Stat. 4 (codified in scattered sections of 28 U.S.C.), which protects defendants from unfair, and potentially bankrupting, class or mass actions in state courts where the issues implicate federal commerce concerns and present enormous exposure. S. REP. No. 109-14,

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[8] Following the Civil War, for example, Congress substantially expanded diversity jurisdiction by eliminating the requirement that cases involve at least one citizen of the forum state and by permitting both plaintiffs and defendants to remove. *See* Act of Mar. 3, 1887, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433.

at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 6. ("One of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."). As Judge Higginbotham recently observed, Congress enacted CAFA "to give access to federal district courts to defendants exposed to these private claims, presumably for reasons not far removed from those that led the first Congress to confer diversity jurisdiction — known then and now to the trial bar as 'home cooking.'" *In re Katrina Canal Litig. Breaches*, No. 08-30145, 2008 WL 1118174 at *8 (5th Cir. Apr. 11, 2008).

Unless corrected, *Lowery* leaves out-of-state defendants unprotected and vulnerable to exactly the kind of local prejudice removal was meant to cure. The outcome in *Lowery* — not least saber-rattling about Rule 11 — will inevitably reward artful pleading and forum-shopping on the one hand; and, on the other, breed timidity and fear of removal.

The trend has shown itself already. In a recent case, the district court remanded a case it readily acknowledged would have remained in federal court prior to *Lowery*. *See Constant v. Int'l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007). With respect to the defendant's reliance on a number of "eye-popping" Alabama jury verdicts in similar tort cases to establish the amount in controversy, the court noted that in the past "[d]istrict courts, including this court, have, without hesitation, allowed such removals unless the plaintiff resolved the ambiguity that she herself deliberately created by conceding that she will

forever forego any claim above $75,000." *Id.* at 1309. The court believed it could no longer consider such evidence after *Lowery*. *Id.* The same fate applied to the defendant's reliance on a settlement request received from the plaintiff's counsel prior to filing the lawsuit in which he demanded exactly $75,000. *Id.* at 1310. Assuming this was, as represented, an attempted pre-suit compromise, the offer surely represented less than the value of the litigated claim, were it to be successful. Demonstrating the brute strength of *Lowery*, the court concluded that not only must it reject this evidence on the issue of amount in controversy; but that removal on these bases (*i.e.*, the description of the events and injuries in the complaint, compared to past jury verdicts involving similar events and injuries, and an offer to compromise at one dollar below the jurisdictional amount) after *Lowery* would be tantamount to asking the court to "speculate," thereby exposing the defendant to costs, attorneys fees, and Rule 11 sanctions. *Id.* Only the bravest — or most foolhardy — defendant would be willing to take such risks at the very outset of a high-stakes case.

Worse, if *Lowery* were applied in some jurisdictions, diversity removal would be close to impossible. In Michigan, for example, state court rules do not permit a plaintiff in a case that was not for a sum certain to request a specific amount of damages *unless* the claim was for an amount of $10,000 or less. *Mich. Mfrs. Serv., Inc. v. Robertshaw Controls Co.*, 134 F.R.D. 154, 155 (E.D. Mich. 1991) (citing Michigan Court Rule 2.111(B)(2)). Therefore, the plaintiff was forbidden by Michigan law from pleading an amount in excess of the federal jurisdictional minimum — even if he valued the case as such. This led one creative plaintiff to

argue that remand was required because the removing defendant failed to point to any facts supporting the allegation that the amount in controversy had been met. The court concluded that "under the 1988 amendment to 28 U.S.C. § 1446(a) the argument that the removing defendant must provide supporting facts in its notice of removal is utterly without merit." *Id.* As a result, the court rejected the plaintiff's attempt to "use its compliance with the Michigan court rule as a shield against removal." *Id.* at 156. Had the court applied *Lowery*'s analysis of § 1446, however, it would not only have remanded the case, but perhaps sanctioned the removing defendant.

Lowery recognized the obvious in observing that "a plaintiff who has chosen to file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount to the damages sought in her complaint." *Lowery*, 483 F.3d at 1215. In so doing, the court issued an open invitation to plaintiffs both to forum-shop and to engage in exactly the kind of "artful pleading" tailored to strip defendants of their "right to remove."

CONCLUSION

In the 20 years following the 1988 amendment to 28 U.S.C. § 1446, district and circuit courts have struggled to define the pleading requirements for removal and the procedure and burden of proof for remand. This conflict is most obvious and inescapable in the two most recent decisions from the Fourth and Eleventh Circuit. They present a well-framed opportunity for this Court to resolve these conflicts

and lend uniformity and continuity to this important body of federal law.

For the foregoing reasons, PLAC respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Corporate Members of the Product Liability Advisory Council

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Mueller Water Products
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Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
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Zimmer, Inc.

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No. 07-1246

IN THE

Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* DRI IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* DRI[1]

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—especially on national issues—consistent.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership and the judicial system. This is just such a case. DRI believes that resolution of the important federal jurisdiction and procedural issues that the Petition squarely presents is critical because the lower courts have fractured severely over the burden of proof that a defendant must carry in establishing the amount in controversy for removing a diversity suit to federal court and over the means for obtaining the necessary proof. The issues presented affect a substantial number of cases that are removable on the basis of diversity jurisdiction, as well as class and mass actions that are removable

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. Petitioners and respondents have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

under the recently-enacted Class Action Fairness Act of 2005 ("CAFA"). Indeed, the confusion fostered by the divergent and conflicting standards applied by the lower courts, as well as the outcomes that will result from the stringent standard adopted by the court of appeals below, create the very impediments to federal court review of cases with national implications that Congress sought to eliminate with the passage of CAFA. Because the right of removal is an issue of particular significance to defendants, DRI's members are frequently confronted with the precise issues raised by the Petition, and their clients are affected by the lack of a clear, uniform rule.

DRI opposes the stringent standard adopted by the court of appeals below for evaluating the amount-in-controversy minimum and its categorical rule disallowing jurisdictional discovery for those seeking to establish it. But what is of paramount importance now is that this Court should grant review in order to resolve the conflict in the lower courts. Adoption of a uniform rule that governs all future federal courts in their review of removal petitions is essential, and will prevent unseemly and unfair forum-shopping and bring consistency and predictability to removal actions.

INTRODUCTION

Petitioners have presented a thorough statement of the case (which DRI will not repeat) and have demonstrated persuasively the split among lower courts on the issues presented, as well as various reasons why this Court should grant the Petition. *Amicus* DRI fully supports review of these issues and submits this brief to highlight significant additional reasons why this Court should grant certiorari.

This case squarely implicates a long-standing and well-defined circuit split. This mature conflict presents a compelling case for intervention by this Court as it falls squarely within the Court's traditional duty to ensure uniformity on issues of federal court jurisdiction and procedure. In addition, the recent adoption of CAFA renders the need for intervention even more urgent, as the disparate standards used by the circuits disrupt the very purposes of CAFA, which creates an additional class of cases in which the amount-in-controversy issue is of central importance.

Furthermore, the lack of uniformity on the important issues of jurisdiction and procedure raised by the Petition will lead to inappropriate forum-shopping, particularly in class and mass actions governed by CAFA. Indeed, the stark disparity between the Eleventh Circuit's standard, as well as others like it, and the more defendant-favorable standards in other circuits inevitably will cause plaintiffs who desire to remain in state court to file in Circuits whose rules favor plaintiffs. Such forum-shopping merely to defeat defendants' rights of removal serves no useful purpose and should not be countenanced. The Court has regularly granted certiorari to establish uniformity on issues of federal jurisdiction and procedure and should do so now.

REASONS FOR GRANTING THE PETITION

I. THE WELL-ACKNOWLEDGED AND LONG-STANDING CONFLICT ON THE BURDEN A DEFENDANT SEEKING REMOVAL MUST SATISFY IN PROVING THE AMOUNT IN CONTROVERSY WHEN DAMAGES ARE UNSPECIFIED COMPELS THIS COURT'S INTERVENTION.

1. As the Petition demonstrates, this Court has not confronted the standard for establishing the amount-in-controversy minimum in removal cases since *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). See Pet. at 18-21. *St. Paul* addressed only the standard for defeating removal based on diversity jurisdiction when the plaintiff's complaint specifies damages, *St. Paul*, 303 U.S. at 288-89, and did not address the specific issues presented in the Petition.

Critically, this Court did not have occasion to address the first issue presented because it has arisen as a result of standards adopted by the Federal Rules of Civil Procedure (in the same year that the Court decided *St. Paul*) and state rules patterned after the Federal Rules. Specifically, two types of state rules have a significant impact on removal and have given rise to the issue presented. First, many States permit notice pleading and do not require plaintiffs to plead a sum certain in their complaints; indeed, many flatly prohibit plaintiffs from claiming a specific amount of damages. See, *e.g.*, Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 Mo. L. Rev. 681, 686-90 (1997); see also *Singer* v.

State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 375-76 (9th Cir. 1997); *De Aguilar* v. *Boeing Co.*, 47 F.3d 1404, 1410 (5th Cir. 1995).

Second, and relatedly, most States have adopted the standard embodied in Federal Rule 54(c), which permits plaintiffs to recover well in excess of any amounts stated in their complaints. See Am. Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* § 1381(c), at 345 (1969) (explaining that construction of "Rule 54(c) and corresponding state provisions" to permit "recovery of damages in excess of those demanded ... is nearly universal"); Noble-Allgire, *supra*, at 686-90 (noting the problem of state statutes that do not require plaintiffs to specify damages, but then allow recovery in excess of any amount stated in the complaint); 14C Charles Alan Wright et al., *Federal Practice & Procedure* § 3725, at 96 (3d ed. 1998). As a result, defendants frequently are saddled with a heavy burden when they attempt to remove diversity cases based only on bare pleadings, even as they face potential damages well in excess of any jurisdictional threshold.

As the Petition demonstrates in detail, in the seven decades since this Court decided *St. Paul*, lower courts have deeply fractured over the precise burden a removing defendant must carry when damages are unspecified. See Pet. at 10-14 (describing the various standards employed). Indeed, Wright & Miller's *Federal Practice & Procedure* and *Moore's Federal Practice*—two authoritative treatises on federal jurisdiction—devote no fewer than 31 pages and six pages, respectively, to listing the divergent decisions on this issue. 14C Wright et al., *supra* § 3725, at 89-95; *id.* § 3725, at 45-68 (2007 suppl.); 16 James Wm. Moore et al., *Moore's Federal Practice* § 107.14[2][g],

at 107-86.1 to 107-86.4 (3d ed. 2008). Accordingly, it would be hard to find a more compelling example of a clear division in the lower courts that results in disparate outcomes.

2. The current lack of uniformity on this issue of federal jurisdiction and procedure especially warrants this Court's review. It goes without saying that standards for federal jurisdiction and procedure should be uniform. This Court has proclaimed unequivocally that "there should be a consistent practice in dealing with jurisdictional questions." *McNutt* v. *Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 188 (1936). Indeed, there is nothing more wasteful than having to litigate over where to litigate. Moreover, the very purpose of the Federal Rules was to create a single uniform system of procedure, Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995) (quoting Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 Cornell L.Q. 443, 448 (1935)), and, indeed, Congress charged this Court with the responsibility to "prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals," *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 5 n.3 (1987) (quoting 28 U.S.C. § 2072).

Further, this Court has not hesitated to grant certiorari to resolve legal conflicts about the standards governing removal to federal court. See, *e.g.*, *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999); *Wis. Dep't of Corr.* v. *Schact*, 524 U.S. 381, 392 (1998); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 126 (1995); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), *abrogated on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996);

Shamrock Oil & Gas Corp. v. *Sheets*, 313 U.S. 100, 103 (1941). It should do so now.

3. Heightening the real-world impact of this conflict and the urgent need for this Court's review is Congress's recent enactment of CAFA. CAFA establishes original jurisdiction in the district courts over diversity-of-citizenship class and mass actions in which the amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2). Thus, CAFA creates another category of cases in which the "amount in controversy" is a decisive issue in determining the appropriate judicial forum.

Significantly, a key purpose of CAFA was to amend "current law" which "enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. No. 109-14, at 4 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5-6. Indeed, Congress intended CAFA to "make[] it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction," *id.* at 5, *as reprinted in* 2005 U.S.C.C.A.N. at 6, noting that "class action lawyers typically misuse the jurisdictional threshold to keep their cases out of federal court," *id.* at 10-11, *as reprinted in* 2005 U.S.C.C.A.N. at 11-12.

This problem, however, is exacerbated by the current conflict in the lower courts because courts use the same standard for determining whether the $5,000,000 threshold is satisfied in CAFA removal cases that they use in determining whether the $75,000 threshold is satisfied in diversity removal cases. See, *e.g.*, 28 U.S.C. § 1453(b) (removal under CAFA follows the procedures of § 1446); *Guglielmino* v. *McKee Foods Corp.*, 506 F.3d 696, 699-700 (9th Cir.

2007) (noting the application of prior standards to CAFA cases). Because of this, CAFA cases immediately became embroiled in the lower courts' fractured approaches to establishing federal jurisdiction. See, *e.g.*, Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. Pa. L. Rev. __ (forthcoming June 2008), draft at 17-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966 ("If anything, the CAFA cases have added to the confusion.").

The lack of a uniform standard runs counter to Congress's intent in enacting CAFA. Congress was concerned with plaintiffs "gaming the system" by employing procedural rules to defeat jurisdiction. But the split among courts will allow plaintiffs to continue to game the jurisdictional system. Indeed, as demonstrated below, plaintiffs will gravitate toward those jurisdictions that make removal more difficult and, thus, engage in rank forum-shopping. This will create "magnet" jurisdictions that will attract CAFA cases purely because the standards to defeat removal are friendlier to plaintiffs. Only review and a decision by this Court can prevent this unseemly process and waste of resources.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE SPLIT AT ISSUE, IF LEFT UNRESOLVED, WILL INCREASE FORUM-SHOPPING.

Variant practices on important issues of jurisdiction and procedure, like those here, inevitably give rise to forum-shopping. The more that significant rules of procedure and jurisdiction "vary, the greater the amount of likely forum shopping." Chemerinsky & Friedman, *supra* at 782. And lack of uniformity and forum-shopping result in inefficien-

cies and added costs on the parties and courts. *Id.* at 782-83.

The conflicts here concerning the standard a removing defendant must meet to establish the amount in controversy and the methods it may employ in doing so make the danger of forum-shopping especially acute.

1. The removal statute operates amid the competing desire of plaintiffs to have their forum of choice and the importance of federal jurisdiction over cases of federal significance. Generally, plaintiffs control the content of the complaint and the choice of forum. At least one recent study suggests that plaintiffs' attorneys often choose to file in state court because they believe that the state forum will result in more favorable outcomes for their clients: "data reveal that one of the strongest factors in [a plaintiff] attorney's choice of [a state] forum is the attorney's perception of a judicial predisposition to rule in favor of interests like those of the attorney's client." Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 599 (2006); *id.* at 611 (concluding, in a study of attorney choices between state and federal forums, that plaintiffs' "[a]ttorneys tended to file in the jurisdiction they thought would be predisposed to their clients' interests").

However, defendants have a statutory "right of removal" when the enumerated statutory requirements for removal are satisfied. *E.g.*, *St. Paul*, 303 U.S. at 293. The reasons for this critical right inhere in the Founders' rationales for creating a federal court system in the first place. As Chief Justice Marshall explained:

> However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of United States v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled on other grounds*, *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844); see also *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (Story, J.) ("The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."). In other words, "[a]s seems to be true of the original diversity of citizenship jurisdiction of the federal courts, the right of removal probably was designed to protect nonresidents from the local prejudices of state courts." 14B Wright et al., *supra* § 3721, at 289.

Befitting a mechanism that ensures against local bias, the removal statute, as this Court has acknowledged, "is nationwide in its operation" and "was intended to be uniform in its application." *Shamrock Oil & Gas Corp.*, 313 U.S. at 104; *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("[T]he removal statutes and decisions of this Court are intended to have uniform nationwide application."). Indeed, recognizing a defendant's right to

removal, as well as the need for a uniform national rule, this Court has warned against burdens on establishing the amount in controversy that would subject the "right of removal ... to the plaintiff's caprice." *St. Paul*, 303 U.S. at 294. A "plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election." *Id.*; see also *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) ("courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum'").

2. Yet the current division among lower courts concerning a removal defendant's burden to establish the amount in controversy, as well as the means for doing so, inevitably gives rise to forum-shopping because the standards adopted by the Eleventh Circuit, but not other courts, allow plaintiffs to defeat defendants' removal rights by artful pleading in order to retain their preferred state forum. The stringent standard adopted by the Eleventh Circuit and other jurisdictions that have adopted the "legal certainty" test gives plaintiffs a clear incentive to file state-court actions in those jurisdictions. That is, filing within those jurisdictions "would be encouraged by the divergent effects that the litigants would anticipate from" defendants' virtual inability to remove a particular case there. *Semteck Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (citing *Hanna* v. *Plummer*, 380 U.S. 460, 468 (1965)).

The Eleventh Circuit, in establishing a strict test for determining whether the amount-in-controversy requirement has been met, essentially has provided a roadmap for plaintiffs who desire to keep cases in state court. The jurisdictional amount must be "either stated clearly on the face of the documents before the court, or readily deducible from them .... If

not, the court *must* remand." Pet. App. at 61a (emphasis added). Moreover, jurisdiction can only be established when a "document received by the defendant *from the plaintiff*" "contain[s] an unambiguous statement that clearly establishes federal jurisdiction." *Id.* at 66a, 67a n.63 (emphasis added); see also *id.* at 85a (rejecting evidence of damages recoveries in other cases because that evidence "was not received from the plaintiffs").

To defeat removal, then, a plaintiff need only take the simple step of refraining from turning over any document to the defendant that contains an unambiguous statement of the damages sought. This is not difficult, particularly since, in typical diversity cases, the plaintiff need only delay until the one-year removal period for such cases has run. See 28 U.S.C. § 1446(b) ("a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action"); see also *Guglielmino*, 506 F.3d at 700 n.3 ("We acknowledge that the one-year removal period presents a significant potential for 'games-manship' in that a plaintiff can wait until the removal period has closed and then amend their complaint to seek higher damages.").

Indeed, the Eleventh Circuit's rule effectively leaves defendants without any means to combat plaintiffs' tactics to remain in state court—unless they are willing to run the risk of Rule 11 sanctions. The court of appeals stated that it is "highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case ... where the defendant ... has only bare pleadings containing unspecified damages on which to base its notice ... without seriously testing the limits of compliance with Rule 11." Pet. App. at 67a n.63. The

court adopted this almost per se rule even as it candidly acknowledged that "a plaintiff who has chosen to file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount to the damages sought in her complaint." *Id.* at 67a-68a n.63. And, the court of appeals adopted this rule notwithstanding state rules that allow plaintiffs to conceal the true value of their claims and, ultimately, to recover damages well in excess of the amount-in-controversy requirement for diversity jurisdiction (that is, even though the case in fact satisfies the criteria for removal).

The harmfulness of the court of appeals' almost per se rule is compounded by its rejection of any possibility for defendants to conduct discovery once they have sought removal. According to the court, not only is jurisdictional discovery absolutely unavailable, but the mere "request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court." Pet. App. at 78a.

In stark contrast to the Eleventh Circuit, other courts have recognized the potential for plaintiffs who desire to remain in state court to engage in gamesmanship and artful pleading and have adopted legal standards specifically intended to prevent such conduct. For example, in *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), the Seventh Circuit observed that "[w]hen the plaintiff prefers to be in state court ... the complaint may be silent or ambiguous on one or more of the ingredients needed to calculate the amount in controversy." *Id.* at 449. Accordingly, the court of appeals held that the defendant must only show "a reasonable probability

that the stakes exceed the minimum" required under CAFA. *Id.* In applying this standard, the court extrapolated from the number of allegedly violative acts committed (the number was admitted in the removal notice), the possible statutory award for each, and the fact that the sum could be trebled to find that "recovery exceeding $5 million for the class as a whole is not 'legally impossible.'" *Id.* Hence, the court concluded that federal jurisdiction existed, and it permitted removal.

Similarly, the Ninth Circuit has affirmed, under the preponderance-of-the-evidence standard, a district court's calculation that the amount in controversy was met by adding the "economic damages ... accounted for, ... attorneys' fees (measured by a 'conservative' *estimate* of 12.5% of economic damages) ..., and ... punitive damages ('conservatively *estimated*, at a 1:1 ratio to economic damages)." *Guglielmino*, 506 F.3d at 698, 701 (emphases added).

In like fashion, the Sixth Circuit, in *Gafford* v. *General Electric Co.*, 997 F.2d 150 (6th Cir. 1993), adopted the preponderance standard and eschewed any more stringent burden as contrary to the proper balance struck by Congress in enacting the amount-in-controversy requirement. *Id.* at 158-59; see also *Rogers* v. *Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000) ("State counterparts to Fed. R. Civ. P. 54(c) might enable a plaintiff to claim in her complaint an amount lower than the federal amount in controversy but nevertheless seek and recover damages exceeding the amount prayed for"). In *Gafford*, the court concluded that the burden was satisfied by testimony from the *defendant's* senior counsel, who testified that, if plaintiff prevailed on her claims, the amount of backpay, "attorney fees[,]

and other damages" would exceed the jurisdictional threshold. *Gafford*, 997 F.2d at 160-61.

As these exemplary cases and others make clear, not only will courts outside of the Eleventh Circuit look beyond whether the *plaintiff* has turned over a document with an "unambiguous" statement as to damages, but frequently will consider the nature of the claims and evidence in the form of prior complaints, similar judgments, affidavits, interrogatories, or other "'summary-judgment-type evidence'"—the very evidence the Eleventh Circuit banned absolutely—in evaluating whether a defendant has carried its burden. *E.g.*, *Singer* v. *State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (quoting *Allen* v. *R&H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).[2] The Eleventh Circuit's approach thus starkly conflicts with that of these other circuits.

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[2] *Singer*, and *Allen* upon which it relies, specifically permits courts to "require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal." 116 F.3d at 377 (internal quotation marks omitted). And as the Petition illustrates, the Eleventh Circuit's decision to disallow all discovery conflicts with this Court's precedent and the decisions of multiple lower courts. Pet. at 22-24. Indeed, this Court has stated specifically in reviewing a jurisdictional dispute over whether the amount in controversy was met that "the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist." *Wetmore* v. *Rymer*, 169 U.S. 115, 120 (1898). As this Court also observed in *Land* v. *Dollar*, 330 U.S. 731 (1947), district courts "as a general rule ... have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings" because "when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion ... the court may inquire by affidavits or otherwise, into the facts as they exist." *Id.* at 735 & n.4.

Courts that have adopted lesser burdens of proof have rejected stringent standards like the one adopted by the Eleventh Circuit precisely because they have recognized that such a heavy burden allows plaintiffs to "game the system" in order to remain in state court. The Fifth Circuit, for example, eschewed too stringent a standard because it would "fail[] adequately to protect defendants from plaintiffs who seek to manipulate their state pleadings to avoid federal court while retaining the possibility of recovering greater damages in state court following remand." *De Aguilar*, 47 F.3d at 1411; *id.* at 1410 (recognizing that state "rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading").

Similarly, the Sixth Circuit adopted the preponderance standard specifically because it "does not place upon the defendant the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement. Such a burden might well require the defendant to research, state and prove the plaintiff's claim for damages." *Gafford*, 997 F.2d at 159; see also *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993) (noting the "comic scene [of] plaintiff's personal injury lawyer protest[ing] up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a

sob story about how plaintiff's life has been wrecked.").[3]

The stark disparity between the standards adopted by the Eleventh Circuit and courts in other circuits—if left uncorrected—inevitably will draw plaintiffs who desire to remain in state court to file in that Circuit. As one commentator has remarked, "the state courts within the Eleventh Circuit are now ideal locations for astute plaintiffs' counsel to file numerous complaints in an effort to avoid federal court." Penelope A. Dixon & David J. Walz, *Removal After* Lowery v. Alabama Power Co.*: A Whole New Bag of Tricks*, 26 No. 4 Trial Advoc. Q. 39, 43 (2007). This is particularly disheartening because many of the state courts within the Eleventh Circuit have been consistently considered among the most plaintiff-friendly forums, approving enormous recoveries based on arguably dubious claims and novel theories of recovery.[4]

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[3] District courts too have noted, in rejecting harsh standards like the one adopted by the Eleventh Circuit, that the "important issue of whether a federal court has jurisdiction over a lawsuit on the basis of the amount in controversy should be decided on the basis of substance, not gamesmanship." *Bolling* v. *Union Nat'l Life Ins. Co.*, 900 F. Supp. 400, 405 (M.D. Ala. 1995). A plaintiff should not be able "to 'have his cake and eat it too'" by preventing "federal jurisdiction by failing to demand a specific monetary figure, while making it possible for the jury to return a verdict well in excess of' the threshold amount. *Steele* v. *Underwriters Adjusting Co.*, 649 F. Supp. 1414, 1416 (M.D. Ala. 1986).

[4] *See, e.g.*, Am. Tort Reform Ass'n, *Judicial Hellholes 2007*, at 5-7, 25 (2007), *available at* http://www.atra.org/reports/hellholes/report.pdf (naming south Florida as one of the most plaintiff-friendly judicial forums and giving Georgia dishonorable mention); Am. Tort Reform Ass'n, *Judicial Hellholes 2005*, at 28-30, 32-34 (2005), *available at* http://www.atra.org/reports/

The inevitable forum-shopping that will result purely as a result of the conflict in the lower courts serves no useful purpose and will unfairly deprive defendants of the federal forum that the Constitution and Congress meant to provide. Moreover, it will result in inefficiency and increased costs on parties and the courts. In particular, divergent approaches among federal courts will spawn "lengthy and costly fights over the location of the litigation." Chemerinsky & Friedman, *supra* at 783.

The potential for forum-shopping is particularly significant with respect to class and mass actions governed by CAFA. The Eleventh Circuit has provided a roadmap for plaintiffs (such as the plaintiffs here) to avoid the $5,000,000 jurisdictional minimum and thereby to avoid federal court. As a result, state courts in the Eleventh Circuit will become magnets for class and mass actions, in clear contravention of Congress's purpose in passing CAFA to prevent class action lawyers from "misus[ing] the jurisdictional threshold to keep their cases out of federal court." S. Rep. No. 109-14, at 10-11, *as reprinted in* 2005 U.S.C.C.A.N. at 11-12.

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hellholes/2005/hellholes2005.pdf (naming south Florida and eastern Alabama).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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